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919
No. 14588

United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,
vs.

ADOLPH G. SUTRO,
Appellee.

ADOLPH G. SUTRO,
Appellant,
vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record
In Two Volumes

Volume I
(Pages 1 to 312)

Appeals from the United States District Court for the
Southern District of California,
Southern Division.

FILED
MAR 10 1955

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the District Court of the United States, in and
for the Southern District of California, South-
ern Division

No. 1183

ADOLPH G. SUTRO,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT FOR MONEY DAMAGES UNDER
FEDERAL TORT CLAIMS ACT

To the Honorable Judges of the District Court of
the United States, for the Southern District of
California, Southern Division:

Adolph G. Sutro, plaintiff herein, complains of the
United States of America, a sovereign power, de-
fendant, and for a first cause of action alleges:

I.

Plaintiff is, and at all times herein mentioned has
been, a resident of the City and County of San Fran-
cisco, State of California; the real property herein-
after mentioned is located within the County of San
Diego, State of California, and is within the juris-
diction of this Honorable Court, and the acts or
omissions herein complained of occurred within the
said County of San Diego, State of California, and
within the jurisdiction of this Honorable Court; the
ground upon which the jurisdiction of this Court

depends [2*] is that this is a suit against the United States of America which arises and is brought by plaintiff under the authority of and pursuant to the provisions of the Act of Congress approved June 25, 1948, establishing a Judiciary and Judicial Procedure Code of the United States, 62 Stat. 869 ff., U.S. Code Title 28, Public Law 773, Chapter 646, and particularly Sections 2671 to 2680 of said Act, (which Sections are sometimes referred to as the Federal Tort Claims Act) as amended, as hereinafter more fully appears.

II.

Plaintiff is the owner and entitled to the possession of that certain real property located in the County of San Diego, State of California, more particularly described as follows:

Parcel 1:

Lots 1, 2, and 3 in Section 28; and Lot 7 and the Northwest Quarter of the Northeast Quarter of Section 33, Township 10 South, Range 4 West, San Bernardino Meridian, in the County of San Diego, State of California, according to United States Government Survey thereof indicated on the Plat of said Township, approved by the Surveyor General on April 5, 1881.

Also all those portions of Lots 1 and 2, in said Section 33, Township 10 South, Range 4 West, San Bernardino Meridian, in the County of San Diego, State of California, according to said Plat approved April 5, 1881, lying above and to the North and

***Page numbering appearing at foot of page of original Certified Transcript of Record.**

East of the meander lines of Pond in said Section 33, as said meander lines are shown on said Plat and as same are more particularly described in the Surveyor's notes accompanying the same, Excepting and Reserving therefrom that portion of Lot 1, Section 33, Township 10 South, Range 4 West, San Bernardino Meridian, conveyed by M. M. Crookshank and Margaret A. Crookshank to John Johnston, Jr., [3] and Dell Hale Johnston by deed dated November 6, 1913, and recorded in Book 645, page 45 of Deeds, and described in said deed as follows:

Beginning at the meander corner No. 20 of that certain Pond in said Section 33, as said pond was surveyed by James Pascoe for the United States Government, said meander corner being now marked by a $\frac{3}{4}$ inch iron pipe; thence running North $84^{\circ}11'$ East 759.6 feet to the Easterly line of said Lot 1 in Section 33, Township 10 South, Range 4 West, San Bernardino Meridian; thence South $0^{\circ}8'$ East along said line 636 feet to the Southeast corner of said Lot 1; thence North $88^{\circ}28'$ West along the Southerly side of said Lot 1; a distance of 484 feet to an intersection with the meanders of said Pond; thence following the meanders of said Pond North 30° East 29.5 feet to meander Corner No. 21; thence North $29^{\circ}0'$ West 594 feet to the point of beginning.

Also that portion of Lot 3 in Section 33, Township 10 South, Range 4 West, San Bernardino Meridian, in the County of San Diego, State of California, according to United States Government Survey approved April 5, 1881, described as follows:

Beginning at a point of intersection of the West

line of said Lot 3 with the Southeasterly line of the Rancho Santa Margarita Las Flores; thence Southeasterly in a direct line to meander corner No. 16 of that certain "Pond" of unnavigable Lake in said Section 33, as said Pond was surveyed by James Pascoe for the United States Government; thence Southeasterly along the meander line of said Pond to an intersection with the line between Lots 3 and 2 of said Section 33; thence North along said boundary line to the Northeast corner of said Lot 3; thence West along the North line of said Lot 3 to an intersection with the Southeasterly [4] line of said Rancho Santa Margarita Y. Las Flores; thence Southwesterly along said boundary line to the point of beginning.

Excepting therefrom those portions of said Lot 3 included in the deed from Angel Mesa and Flora Mesa, his wife, to John Johnston, Jr., recorded in Book 522, page 319 of Deeds, records of San Diego County, and described therein as "all land in said Lot 3, Section 33, which underlies that portion of said pond or unnavigable Lake in said Lot 3, in said Section 33, to the center line of said Pond or unnavigable lake or which is any time covered or submerged by the waters of that portion of said pond or unnavigable lake in said Lot 3 in said Section 33" and also excepting a strip of land 15 feet wide outside of, parallel with and adjacent to and within 15 feet from said meander line in said Lot 3.

Parcel 2:

That portion of Lot 3, Section 33, Township 10

South, Range 4 West, San Bernardino Meridian, in the County of San Diego, State of California, according to United States Government Survey approved April 5, 1881, described as follows:

Commencing at a point on boundary line between Lot 2 in Section 32, Township 10 South, Range 4 West, San Bernardino Meridian, and Lot 3 in Section 33, Township 10 South, Range 4 West, San Bernardino Meridian, 17.89 feet North of the point where that certain meander line of that certain pond or unnavigable lake in Sections 32 and 33, Township 10 South, Range 4 West, and Section 5, Township 11 South, Range 4 West, (which meander line is particularly set out in a Patent from the State of California to John Johnston, Jr., and recorded in Book 7, [5] page 494, of Patents, in the Office of the County Recorder of San Diego County) intersects said boundary line between said Lot 2 and said Lot 3; thence running South 57° East to a point North $14^{\circ}37\frac{1}{2}'$ East 15.81 feet from the Southeasterly end of that certain line or course which forms a part of said meander line and being that portion of said meander line which intersects the said boundary line between said Lot 2 and said Lot 3 (which said course and distance of said portion of said meander line is as follows, to wit: South 57° East 5.48 chains; thence running North $86\frac{1}{4}^{\circ}$ East 220.56 feet; thence running North $46\frac{1}{4}^{\circ}$ East 439.66 feet; thence running North 50° West 665.15 feet; thence running North $61\frac{1}{2}^{\circ}$ East 772 feet to an intersection with a line drawn from meander corner No. 16, of that certain "Pond" in said Section 33, as said Pond was

surveyed by James Pascoe for the United States Government, to the point of intersection of the West line of said Lot 3 with the Southeasterly line of the Rancho Santa Margarita Y Las Flores; thence Northwesterly to said point of intersection of the West line of Lot 3 with the Southeasterly line of the Rancho Santa Margarita Y Las Flores; thence South along the West line of said Lot 3 to the point of beginning.

Except therefrom, one-half interest in all oil rights as reserved in a Deed from Lyle Smith to Charles Goss and Lizzie Goss, dated April 17, 1920.

Plaintiff has owned Parcel 1 above described since January 17, 1946, and has owned Parcel 2 above-described since February 23, 1946.

III.

Said land above described is rich, productive farm land, well suited for the growing of vegetables, including specifically but [6] not limited to celery, peppers, tomatoes and strawberries, and portions thereof had been used for growing said crops for a long time prior to plaintiff's purchase thereof, as hereinabove set forth; said property is bounded upon the north by that certain property owned by the defendant upon which property the defendant has established, and has at all times herein mentioned, maintained a training center known as "Camp Joseph H. Pendleton," which training center is hereinafter referred to as Camp Pendleton.

IV.

A natural water course, sometimes known as Pil-

grim Creek, flows in the general direction from north to south through Camp Pendleton and from said camp to the said property owned by plaintiff and hereinabove described; said Pilgrim Creek then flows through plaintiff's property from its northerly boundary to its southerly boundary, completely bisecting said property; and except for, and until, the acts of the defendant hereinafter mentioned, the water of said Pilgrim Creek was of a clear and wholesome quality and was suitable for use for domestic and farm purposes, and was used to irrigate vegetables grown upon the said property hereinabove described, and particularly celery, green peppers, strawberries and tomatoes, which vegetables were of great value;

A well is also located upon said property of plaintiff, and, except for, and until, the acts of the defendant hereinafter mentioned, the water from said well was of a clear and wholesome quality and was suitable for domestic purposes, and was used as a source of domestic water for the occupants of said property.

V.

For more than five (5) years last past, and continuing up to the present time, the defendant has maintained and housed, and now maintains and houses, on its said property known as Camp Pendleton, many thousand men, the exact number varying from time to time, and being unknown to this plaintiff, but said number always being in [7] excess of several thousand; said defendant has for the last five (5) years wrongfully and negligently failed to

provide proper sewage facilities for said Camp Pendleton, and has continuously, during said five (5) years, wrongfully and negligently emptied and discharged large quantities of sewage, polluted with bacteria and other poisonous decaying matters, into said Pilgrim Creek, where said creek runs through the lands of the said defendant; the amount of polluted sewage discharged by defendant into said Pilgrim Creek has been so great that the entire flow of said creek has become polluted and has remained in such condition when it enters and while it runs through the lands of plaintiff above mentioned.

VI.

Plaintiff has suffered, and still suffers, a special and peculiar injury resulting from said wrongful acts of the defendant in that plaintiff is now, and has been during all of the time plaintiff has owned said land, deprived of the use of the waters of said creek for farm and domestic purposes; pollution by the defendant of the said Pilgrim Creek became so extensive that the Health Department of the County of San Diego ordered that no water from said creek be used on the above-described lands for irrigation of edible vegetables, and that all equipment formerly used for pumping water from said creek and distributing the same upon crops growing on said lands be completely dismantled and torn down; during the time plaintiff has owned said property he has not been able to use said water for growing celery, peppers, tomatoes, strawberries and other crops formerly grown upon said lands, and during said time

said polluted water from said creek has infiltrated into plaintiff's well above mentioned and has polluted the waters therein and rendered them unfit for use.

VII.

As a direct and proximate result of the actions of the defendant, plaintiff has sustained damages for loss of crops for the year [8] 1946, in the sum of \$46,000.00, for loss of crops for the year 1947; in the sum of \$53,000.00, for loss of crops for the year 1948; in the sum of \$41,000.00, for loss of crops for the year 1949; in the sum of \$39,000.00, for the loss of crops for the year 1950, to the date of filing this Complaint in the sum of \$11,000.00, and for loss occasioned by pollution of his well, including the sums required to restore said well to its original condition after the source of said pollution has been removed, the sum of \$10,000.00; the total damages caused to plaintiff's property to and including the date of the filing of this Complaint as a result of the actions of the said defendant is the sum of \$190,000.00.

VIII.

The nuisance above mentioned is continuous and constantly recurring, and is causing plaintiff further damage in the sum of \$125.00 for each and every day it is maintained.

Second Cause of Action

For a further, separate and second cause of action against the defendant, plaintiff alleges:

I.

Plaintiff hereby refers to the allegations of Para-

graphs I and II of his First Cause of Action herein, and by this reference incorporates each and every allegation in said paragraphs contained as a part of this Cause of Action the same as though herein set forth in full. [9]

II.

Said property of plaintiff above described is bounded upon the north by that certain property owned by the defendant, upon which property the defendant has established, and has at all times herein mentioned maintained, a training center known as Camp Joseph H. Pendleton, which training center is hereinafter referred to as Camp Pendleton; a natural water course sometimes known as Pilgrim Creek flows in the general direction from north to south through Camp Pendleton, and from said Camp to the property owned by plaintiff and hereinabove described; said Pilgrim Creek then flows through plaintiff's property from its northerly boundary to its southerly boundary completely bisecting said property, and immediately below plaintiff's property passes into a natural lake known as Foss Lake; from said Foss Lake the waters of Pilgrim Creek flow into the San Luis Rey River, a natural water course which leads to the Pacific Ocean; the portion of the channel of said Pilgrim Creek between said Foss Lake and said San Luis Rey River was of limited capacity, and prior to the year 1945, had become clogged and overgrown with willows and tules.

III.

For more than five (5) years last past, and con-

tinuing up to the present time, the defendant has maintained and housed, and now maintains and houses, on its said property known as Camp Pendleton, many thousand men, the exact number varying from time to time and being unknown to this defendant but said number always being in excess of several thousand; said defendant has for the last five (5) years emptied and discharged large quantities of sewage into said Pilgrim Creek in excess of the carrying capacity of that portion of the channel leading from Foss Lake to the San Luis Rey River, without dredging said channel or removing from it the willows, tules, underbrush and other debris which prevented the rapid flow of water through said portion of the channel of said Pilgrim [10] Creek; the great increase in the volume of water in Pilgrim Creek so occasioned by the acts of defendant caused said creek to wash and erode its banks above plaintiff's land and caused said water to become laden with silt and dirt; the defendant has also, during the last five (5) years, carried on vast construction works on its said property in such a negligent fashion as to cause large quantities of dirt, mud, silt and debris to be washed into the said Pilgrim Creek in addition to the quantities of dirt and silt eroded by the said increased flow; the fall of Pilgrim Creek through plaintiff's lands is less rapid than it is through the defendant's lands and said silt and dirt so carried from defendant's lands has been deposited on plaintiff's lands; as a direct and proximate result of all of the actions of the defendant above described the level of water in Foss Lake was greatly increased

and a small portion of plaintiff's land was flooded, and the water table under an additional portion of plaintiff's land was raised, and said land became marshy and untillable.

IV.

The defendant wrongfully and negligently failed either to reduce its said flow of sewage into said Pilgrim Creek or to enlarge the channel of Pilgrim Creek below Foss Lake or to cease its negligent construction activities for a period of many months; during said time large quantities of alkali and salts were deposited in and on plaintiff's land by said excess waters, rendering said lands unsuitable for agriculture; it will be necessary for plaintiff to expend large sums of money to reclaim said lands and to render them tillable and fit for cultivation, to plaintiff's damage in the sum of \$8,750.00.

Wherefore, plaintiff prays for judgment against the defendant as follows:

Upon his first cause of action, in the sum of \$190,000.00, together with the further and additional sum of \$125.00 for each [11] and every day between the filing of this Complaint and the entry of said judgment.

Upon his second cause of action, in the sum of \$8,750.00;

For a reasonable attorneys' fee to be paid out of the recovery herein to plaintiff's attorneys;

For plaintiff's costs of suit herein incurred; and
For such other and further relief as may seem
proper in the premises.

GRAY, CARY, AMES &
DRISCOLL,

/s/ JOHN M. CRANSTON,
Attorneys for Plaintiffs.

[Endorsed]: Filed April 19, 1950. [12]

[Title of District Court and Cause.]

ANSWER

Comes Now the defendant, United States of
America, and for its Answer to the Plaintiff's com-
plaint on file herein, admits, denies and alleges as
follows:

First Cause of Action

I.

Answering Paragraph I of plaintiff's First Cause
of Action, defendant admits that the real property
mentioned therein is located within the County of
San Diego, State of California; further answering
said paragraph defendant alleges that it does not
have sufficient information upon which to form a
belief as to the truth of the other allegations set
forth therein and on said ground denies each and
every other allegation contained therein; further an-
swering said paragraph, defendant specifically de-
nies that there is any jurisdiction in this Court of

the within action under the provisions of the Federal Tort Claims Act, 28 U.S.C. 1346 and 28 U.S.C. 2671 to 2680, inclusive. [14]

II.

Answering Paragraph II of plaintiff's First Cause of Action, defendant alleges that it does not have sufficient information upon which to form a belief as to the truth of the allegations set forth therein and on said ground denies each and every allegation contained therein.

III.

Answering Paragraph III of plaintiff's First Cause of Action, defendant admits that the real property of the plaintiff is bounded on the north by Camp Joseph H. Pendleton; further answering said paragraph, defendant alleges that it does not have sufficient information upon which to form a belief as to the truth of the other allegations therein and on said ground denies each and every other allegation therein contained.

IV.

Answering Paragraph IV of plaintiff's First Cause of Action, defendant admits that Pilgrim Creek flows in the general direction from north to south through Camp Pendleton and from said camp to the property owned by the plaintiff, and that said Pilgrim Creek then flows through plaintiff's property from its northerly boundary to its southerly boundary, completely bi-secting said property; further answering said paragraph, defendant alleges that it does not have sufficient information upon

which to form a belief as to the truth of the other allegations therein, and on said ground denies each and every other allegation therein contained.

V.

Answering Paragraph V of Plaintiff's First Cause of Action, defendant admits that it maintains and houses large numbers of men at Camp Pendleton, and that their number varies from time to time; further answering said paragraph, defendant both generally and specifically denies each and every other allegation contained therein.

VI.

Answering Paragraph VI of the plaintiff's First Cause of Action, [15] defendant alleges that it does not have sufficient information upon which to form a belief as to the truth of the allegations therein and on said ground denies each and every allegation contained therein; further answering said paragraph, defendant alleges that it is informed and believes that the lands of the plaintiff, the subject matter of this action, have at all times been suitable for the growing of edible farm crops of one type or another, so that the plaintiff at no time has been unable to grow farm crops of substantial value; further answering said paragraph, defendant alleges that the condition of the plaintiff's land is essentially the same as when acquired by him and that the plaintiff has suffered no damage.

VII.

Answering Paragraph VII of plaintiff's First

Cause of Action, defendant alleges that it does not have sufficient information upon which to form a belief as to the truth of the allegations therein and on said ground denies each and every allegation therein contained; further answering said paragraph, defendant both generally and specifically, denies that the plaintiff has suffered crop loss of \$46,000 for the year 1946, \$53,000 for the year 1947, \$41,000 for the year 1948, \$39,000 for the year 1949, \$11,000 for all or any portion on the year of 1950, and for damage to his well in the sum of \$10,000, or a total damage of \$190,000, or that the plaintiff has been damaged in any other sum whatsoever.

VIII.

Answering Paragraph VIII of the plaintiff's First Cause of Action, defendant both generally and specifically denies each and every allegation therein contained.

Second Cause of Action

I.

Answering Paragraph I of plaintiff's Second Cause of Action, defendant admits, denies and alleges to the same extent and to the same effect as the defendant admitted, denied, and alleged in answer to Paragraphs I and II of plaintiff's First Cause of Action, which the plaintiff has incorporated in Paragraph I of his Second Cause of Action by reference. [16]

II.

Answering Paragraph II of plaintiff's Second

Cause of Action, defendant admits that it maintains a training center on certain of its property known as Camp Joseph H. Pendleton, and that that property bounds the property of the plaintiff on the north; further answering said paragraph defendant admits that a natural water course sometimes known as Pilgrim Creek flows in the general direction from north to south through Camp Pendleton, and from said Camp to the property owned by plaintiff, that said Pilgrim Creek then flows through plaintiff's property from its northerly boundary to its southerly boundary completely bi-secting said property, and immediately below plaintiff's property passes into a natural lake known as Foss Lake, and from said Foss Lake the waters of Pilgrim Creek flow into the San Luis Rey River, a natural water course which leads to the Pacific Ocean; further answering said paragraph defendant alleges that it does not have sufficient information upon which to form a belief as to the truth of the other allegations contained therein and on said ground both generally and specifically denies each and every other allegation contained therein.

III.

Answering Paragraph III of Plaintiff's Second Cause of Action, defendant admits that it maintains and houses large numbers of men at Camp Pendleton, and that their number varies from time to time; further answering said paragraph defendant alleges that it does not have sufficient information upon which to form a belief as to the truth of the other allegations contained therein and on said ground

system to satisfy and protect adjoining land owners, but the plaintiff has obstructed and blocked such attempts.

For a Seventh, Further and Distinct Affirmative Defense, This Answering Defendant Alleges:

That the damage to the plaintiff, if any, has been caused by the actions of another adjacent landowner, or landowners, in preventing the defendant from installing additions to its sewage disposal system to carry away surplus waters from Foss Lake, and has not been caused in whole or in part by any negligent or wrongful act of any employee, servant or agent of the defendant acting within the scope of his employment.

ERNEST A. TOLIN,
United States Attorney;

CLYDE C. DOWNING,
Assistant U. S. Attorney,
Chief, Civil Division;

MAX F. DEUTZ,
Assistant U. S. Attorney;

/s/ MAX F. DEUTZ,
Attorneys for Defendant.

Affidavit of service by mail attached.

[Endorsed]: Filed November 1, 1950. [19]

[Title of District Court and Cause.]

SUPPLEMENTAL COMPLAINT FOR DAMAGES UNDER FEDERAL TORT CLAIMS ACT

To the Honorable Judges of the District Court of the United States, for the Southern District of California, Southern Division:

Adolph G. Sutro, plaintiff, bring this, his Supplemental Complaint herein, leave having been granted by this Court so to do, against the United States of America, a sovereign power, and alleges that since the filing of the original Complaint herein the following material facts have occurred, viz.:

I.

On October 9, 1950, plaintiff began digging a first series of seven test holes upon the property referred to and described in Paragraph II of plaintiff's complaint herein; on November 20, 1950, plaintiff began digging a second series of nine test holes; these test holes confirmed the existence of a [21] very large basin of water under plaintiff's lands above-mentioned, and plaintiff accordingly dug a new well upon his said property, said well being in addition to the well referred to in plaintiff's Complaint on file herein; said well was completed and tested by December 16, 1950.

II.

The flow of said well and the supply of water in said underground basin is sufficient to irrigate each

and every acre of plaintiff's entire property referred to in plaintiff's Complaint herein, even during periods of extreme drouth.

III.

At the time plaintiff filed his Complaint herein, although plaintiff was informed and believed that the entire property referred to in Paragraph II of his Complaint had in the past been irrigated with a supply of water from Pilgrim Creek and from the original well referred to in said Complaint, plaintiff did not know of his own knowledge that this supply of water was sufficient to irrigate all his said land, and, therefore, in computing the damages caused plaintiff by defendant's actions, plaintiff considered only the damage caused by the pollution of a supply of water sufficient to irrigate fifty (50) acres of land.

IV.

The water in said underground basin and in said new well referred to in Paragraph I hereinabove have been, and are, polluted by the infiltration of the polluted waters from Pilgrim Creek referred to in plaintiff's Complaint herein; said polluted creek waters have so infiltrated into said underground basin that the entire basin is polluted and the water in plaintiff's new well above mentioned is polluted and unfit for use for domestic purposes or for growing edible vegetables.

V.

As a direct and proximate result of the actions of the [22] defendant, plaintiff has sustained, in addi-

tion to the damages alleged in plaintiff's Complaint on file herein, and since the filing of said Complaint, for loss of crops for the months of April to December, inclusive, in the year 1950, the sum of \$35,000.00; for the loss of crops for the year 1951, up to the date of the filing of this Supplemental Complaint the sum of \$36,000.00; and for loss occasioned by the new well referred to in this Supplemental Complaint, including sums required to purify the underground basin of water tapped by the said well, the sum of \$15,000.00.

VI.

The nuisance referred to in plaintiff's Complaint on file herein has continued at all times since the filing of said Complaint, and still continues to pollute the large underground supply of water hereinabove referred to; said nuisance is causing plaintiff further damage in the sum of \$375.00 for each and every day it is maintained.

Wherefore, plaintiff prays judgment against the defendant as follows.

1. Upon his first cause of action as supplemented by this Supplemental Complaint, in the total sum of \$276,000.00, together with the further and additional sum of \$375.00 for each and every day between the filing of this Supplemental Complaint and the entry of said judgment;

2. Upon his second cause of action in the sum of \$8,750.00;

3. For a reasonable attorneys' fees to be paid out of the recovery herein to plaintiff's attorneys;

4. For plaintiff's costs of suit herein incurred;
and

5. For such other and further relief as may seem
proper in the premises.

GRAY, CARY AMES &
DRISCOLL,

/s/ JOHN M. CRANSTON,
Attorneys for Plaintiff.

Duly verified.

[Endorsed]: Filed April 16, 1951. [23]

[Title of District Court and Cause.]

AMENDED ANSWER

Comes Now the defendant, United States of America, and by leave of the Court this day granted, files this Amended Answer to the Complaint and Supplemental Complaint of the plaintiff Adolph G. Sutro; and for its Answer to the plaintiff's said Complaint on file herein, admits, denies and alleges as follows:

First Cause of Action

I.

Answering Paragraph I of plaintiff's First Cause of Action, defendant admits that the real property mentioned therein is located within the County of San Diego, State of California; further answering said paragraph defendant alleges that it does not

have sufficient information upon which to form a belief as to the truth of the other allegations set forth therein and on said ground denies each and every other allegation contained therein; further answering said paragraph, defendant specifically denies that there is any jurisdiction [25] in this Court of the within action under the provisions of the Federal Tort Claims Act, 28 U.S.C. 1346 and 28 U.S.C. 2671 to 2680, inclusive.

II.

Answering Paragraph II of plaintiff's First Cause of Action, defendant alleges that it does not have sufficient information upon which to form a belief as to the truth of the allegations set forth therein and on said ground denies each and every allegation contained therein.

III.

Answering Paragraph III of plaintiff's First Cause of Action, defendant admits that the real property of the plaintiff is bounded on the north by Camp Joseph H. Pendleton; further answering said paragraph, defendant alleges that it does not have sufficient information upon which to form a belief as to the truth of the other allegations therein and on said ground denies each and every other allegation therein contained.

IV.

Answering Paragraph IV of plaintiff's First Cause of Action, defendant admits that Pilgrim Creek flows in the general direction from north to

south through Camp Pendleton and from said camp to the property owned by the plaintiff, and that said Pilgrim Creek then flows through plaintiff's property from its northerly boundary to its southerly boundary, completely bi-secting said property; further answering said paragraph, defendant alleges that it does not have sufficient information upon which to form a belief as to the truth of the other allegations therein, and on said ground denies each and every other allegation therein contained.

V.

Answering Paragraph V of plaintiff's First Cause of Action, defendant admits that it maintains and houses large numbers of men at Camp Pendleton, and that their number varies from time to time; further answering said paragraph, defendant both generally and specifically denies each and every other allegation contained therein. [26]

VI.

Answering Paragraph VI of the plaintiff's First Cause of Action, defendant alleges that it does not have sufficient information upon which to form a belief as to the truth of the allegations therein and on said ground denies each and every allegation contained therein; further answering said paragraph, defendant alleges that it is informed and believes that the lands of the plaintiff, the subject matter of this action, have at all times been suitable for the growing of edible farm crops of one type or another, so that the plaintiff at no time has been unable to

grow farm crops of substantial value; further answering said paragraph, defendant alleges that the condition of the plaintiff's land is essentially the same as when acquired by him and that the plaintiff has suffered no damage.

VII.

Answering Paragraph VII of plaintiff's First Cause of Action, defendant alleges that it does not have sufficient information upon which to form a belief as to the truth of the allegations therein and on said ground denies each and every allegation therein contained; further answering said paragraph, defendant both generally and specifically denies that the plaintiff has suffered crop loss of \$46,000 for the year 1946, \$53,000 for the year 1947, \$41,000 for the year 1948, \$39,000 for the year 1949, \$11,000 for all or any portion of the year of 1950, and for damage to his well in the sum of \$10,000 or a total damage of \$190,000, or that the plaintiff has been damaged in any other sum whatsoever.

VIII.

Answering Paragraph VIII of the plaintiff's First Cause of Action, defendant both generally and specifically denies each and every allegation therein contained.

Second Cause of Action

I.

Answering Paragraph I of plaintiff's Second Cause of Action, defendant admits, denies and al-

leges to the same extent and to the same effect as the defendant admitted, denied, and alleged in answer to Paragraphs I and II of [27] plaintiff's First Cause of Action, which the plaintiff has incorporated in Paragraph I of his Second Cause of Action by reference.

II.

Answering Paragraph II of plaintiff's Second Cause of Action, defendant admits that it maintains a training center on certain of its property known as Camp Joseph H. Pendleton, and that that property bounds the property of the plaintiff on the north; further answering said paragraph defendant admits that a natural water course sometimes known as Pilgrim Creek flows in the general direction from north to south through Camp Pendleton, and from said Camp to the property owned by plaintiff, that said Pilgrim Creek then flows through plaintiff's property from its northerly boundary to its southerly boundary completely bi-secting said property, and immediately below plaintiff's property passes into a natural lake known as Foss Lake, and from said Foss Lake the waters of Pilgrim Creek flow into the San Luis Rey River, a natural water course which leads to the Pacific Ocean; further answering said paragraph defendant alleges that it does not have sufficient information upon which to form a belief as to the truth of the other allegations contained therein and on said ground both generally and specifically denies each and every other allegation contained therein.

III.

Answering Paragraph III of plaintiff's Second Cause of Action, defendant admits that it maintains and houses large numbers of men at Camp Pendleton, and that their number varies from time to time; further answering said paragraph defendant alleges that it does not have sufficient information upon which to form a belief as to the truth of the other allegations contained therein and on said ground both generally and specifically denies each and every other allegation contained therein except that the defendant admits that from time to time certain amounts of construction work are carried on at Camp Pendleton; further answering said paragraph defendant alleges that it maintains modern sewage treatment plants in which all sewage is adequately treated before any of the affluent is discharged; further answering said paragraph defendant alleges that it is under no duty to remove underbrush, willows, tules, and other debris in the channel of [28] Pilgrim Creek between Foss Lake and the San Luis Rey River on land not owned by the defendant and removed by some distance from the lands of the defendant at Camp Pendleton.

IV.

Answering Paragraph IV of plaintiff's Second Cause of Action, defendant both generally and specifically denies each and every allegation contained therein.

Supplemental Complaint

For its Answer to plaintiff's Supplemental Com-

plaint on file herein, the defendant admits, denies and alleges as follows:

I-VI.

Answering Paragraphs I through VI, inclusive, of plaintiff's Supplemental Complaint, the defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in said paragraphs, and on that ground denies each and every allegation contained therein.

For a Second, Further and Distinct Affirmative Defense, This Answering Defendant Alleges:

'That this Court has no jurisdiction of the subject matter of this action, for the reason that the allegations of the complaint sound in contract and the amount in controversy exceeds the jurisdictional limitations of the Tucker Act, 28 U.S.C. 1346.

For a Third, Further and Distinct Affirmative Defense, This Answering Defendant Alleges:

That this Court has no jurisdiction over the subject matter of this action for the reason that it falls within the exceptions to the Federal Tort Claims Act set forth in Section 2680(a) of Title 28, United States Code.

For a Fourth, Further and Distinct Affirmative Defense, This Answering Defendant Alleges: [29]

That the plaintiff's lands were entirely suitable for the growing of other edible farm crops than those set forth in the complaint, and that the plain-

tiff has failed to plant and grow such crops in mitigation of the elleged loss caused by the defendant.

For a Fifth, Further and Distinct Affirmative Defense, This Answering Defendant Alleges:

That the conditions of the plaintiff's lands of which he complains as having been caused by acts of the defendant, existed prior to, and at the time of, the purchase of said land by the plaintiff, and that the plaintiff had full knowledge thereof, and has suffered no damage thereby; that if said lands are, in fact, unfit to grow the crops enumerated and set forth in the plaintiff's complaint, this condition existed prior to, and at the time of, the purchase of said lands by the plaintiff.

For a Sixth, Further and Distinct Affirmative Defense, This Answering Defendant Alleges:

That the defendant has attempted, ever since the plaintiff acquired the real property involved in this action, to establish additions to its sewage disposal system to satisfy and protect adjoining land owners, but the plaintiff has obstructed and blocked such attempts.

For a Seventh, Further and Distinct Affirmative Defense, This Answering Defendant Alleges:

That the damage to the plaintiff, if any, has been caused by the actions of another adjacent landowner, or landowners, in preventing the defendant from installing additions to its sewage disposal system to carry away surplus waters from Foss Lake, and has

not been caused in whole or in part by any negligent or wrongful act of any employee, servant or agent of the defendant acting within the scope of his employment. [30]

For the Eighth, Further and Distinct Affirmative Defense, This Answering Defendant Alleges:

That in or about the year 1943, and before the plaintiff acquired any interest whatever in the riparian real property described in paragraph II of the first cause of action in plaintiff's Complaint, the defendant, by right of eminent domain under Chs. 43, 199 and 549 of the Public Acts of the 77th Congress, 2d Session (56 Stat. (U.S.) 51, 177, 742, and California Political Code § 34 (Cal. Stats. 1939 Ch. 710), took and acquired for value for public use from the then owners of said real property a permanent right and easement to augment and pollute the waters of Pilgrim Creek by discharging therein at Camp Joseph H. Pendleton the sewage effluents produced by two sewage treatment and disposal plants then constructed and being operated by the defendant at said camp. Such discharge was in 1943, and ever since has been, effected through outfalls, constructed and operated for that purpose by the Secretary of the Navy, connecting the plants with said creek.

Ever since the year 1943, and at all times mentioned in the plaintiff's Complaint as amended, the defendant has continuously, openly, notoriously and adversely used, exercised and enjoyed the right and easement of augmentation and pollution so taken

and acquired, by emptying and discharging the sewage effluents from said two plants into said creek through the outfalls aforesaid. This practice was continuous from 1943 to August 7, 1950, since which latter date the sewage effluent from one of said plants has been diverted for disposal into another watershed and has not entered Pilgrim Creek. The defendant has not emptied nor discharged any sewage into said creek at any time mentioned in the Complaint as amended, other than the sewage effluents from said two plants, and the burden, if any, on the plaintiff's real property caused by such discharge of sewage effluents has not been increased or altered to the detriment of plaintiff's said property during plaintiff's ownership.

At and before he bought said real property in 1946, the plaintiff knew that the defendant had previously taken, acquired and was then using, exercising and enjoying, in the manner above-stated, the right and easement of augmentation [31] and pollution above set forth. Plaintiff bought and has held said property with knowledge at all times of the defendant's said practice and use of said stream.

The augmentation and pollution of the creek waters, well and water basin on plaintiff's said real property, which are charged in the Complaint as amended, if they were caused by the defendant's acts, aforesaid, were the necessary, natural and reasonably-to-be-expected results of the use and enjoyment by the defendant of such right and easement of augmentation and pollution; and all such alleged results, and all the conditions of which the plaintiff

complains in his Complaint as amended, had fully accrued, and existed, at and before the plaintiff acquired said property, and were then known to the plaintiff.

The construction work mentioned in paragraph III of the Second Cause of Action in plaintiff's Complaint was all done and completed by the defendant, or its agents, before the plaintiff acquired said property; and any alleged effects thereof set forth in the Complaint had accrued and existed, as the plaintiff then knew, at and before the time he acquired said property.

All the defendant's actions charged in the complaint, to the extent that such allegations may be true, in whole or in part, were done by the defendant by right of eminent domain and in the performance of public works, and were not tortious as to the plaintiff.

Ever since 1943, and at all times mentioned in the Complaint, the defendant has owned, and has exercised exclusive legislative jurisdiction over, the land and waters embraced within Camp Joseph H. Pendleton. The defendant in 1942-1943, acquired said camp for use, and has at all times since used the same as a fort or area for the training of United States Marine Corps personnel. The use of Pilgrim Creek for sewage disposal was deemed necessary by the Secretary of the Navy in order to facilitate the use of said camp for the above purposes; and this is the public use for which the defendant took, ac-

quired and has since used and enjoyed the right and easement of augmentation and pollution aforesaid.

WALTER S. BINNS,
United States Attorney;
CLYDE C. DOWNING and
JAMES C. R. McCALL,
Assistants United States
Attorney;

By /s/ JAMES C. R. McCALL,
Attorneys for Defendant.

Lodged May 5, 1952.

[Endorsed]: Filed May 9, 1952. [32]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action having been tried by the Court without a jury on the issue of liability alone on July 16 and 17, and July 20 to 24, inclusive, 1953, the Court hereby makes the following Findings of Fact and Conclusions of Law (in addition to the facts set forth in the Pre-Trial Order heretofore signed by Judge Jacob Weinberger) upon the issue of liability alone:

Findings of Fact

1. Sewage Disposal Plants Nos. 1 and 2 at Camp Joseph H. Pendleton were adequately planned and

constructed, and were capable of producing an effluent of such character that the waters of Pilgrim Creek into which the effluent was discharged could thereafter be used for irrigating all edible crops, including vegetables, garden truck, berries and low-growing fruits.

2. The defendant acting through its agents in charge [33] of and operating the said sewage disposal plants, negligently and wrongfully failed adequately and properly to chlorinate the effluent from said Sewage Disposal Plants Nos. 1 and 2, which effluent was discharged into Pilgrim Creek and thence onto plaintiff's property.

3. The operators of the said sewage disposal plants negligently and wrongfully failed to obey or carry out the mandatory directions contained in the manual issued by the United States Navy with reference to the examination and inspection of the effluent of said sewage disposal plants and of the waters of Pilgrim Creek into which the said effluent was discharged, and when tests of the effluent and of the waters of Pilgrim Creek were made in the years 1949-1951, the number of tests made was inadequate and the information provided by the tests was not acted upon.

4. The operators of said sewage disposal plants negligently and wrongfully failed to obey or carry out the mandatory directions of the Eleventh Naval District with reference to the inspection and testing of the effluent of the sewage disposal plants.

5. The waters of Pilgrim Creek prior to the discharge into said creek of the effluents from defendant's Sewage Disposal Plants Nos. 1 and 2 were pure and wholesome, and were suitable for the irrigation of edible crops, including vegetables, garden truck, berries and low-growing fruits.

6. The foregoing acts of the defendant caused the pollution of Pilgrim Creek and rendered its waters unfit and unsuitable for the irrigation of edible crops, including vegetables, garden truck, berries and low-growing fruits.

7. The pollution of Pilgrim Creek so caused by the acts of the defendant resulted in the pollution of the well which was upon plaintiff's property at the time he bought it, and also the [34] pollution of the new well subsequently dug by plaintiff in the fall of 1950, and rendered the waters of each of said wells unfit and unsuitable for the irrigation of edible crops, including vegetables, garden truck, berries and low-growing fruits.

8. The defendant did negligently and wrongfully augment the flow of Pilgrim Creek until the draining of Foss Lake in the latter part of 1946, or the early part of 1947, and caused the silting of the channel of the said creek as it flows through the property of plaintiff, and caused a deposit of silt upon the property of plaintiff.

9. The plaintiff has never blocked or obstructed, or attempted to block or obstruct, any efforts of the defendant to improve its operations with respect

to the discharge of sewage, but on the contrary has cooperated with the defendant whenever requested by the defendant so to do.

10. Defendant has never exercised, or attempted to exercise, the right of eminent domain, or taken or attempted to take an easement to augment and/or pollute the waters of Pilgrim Creek; the defendant has not compensated, or offered to compensate, the plaintiff for any such easement, and no such easement has ever existed, or now exists.

11. The failure of the operators of the sewage disposal plants adequately and properly to chlorinate the effluent from Sewage Disposal Plants Nos. 1 and 2, and to make the tests and inspections directed by the United States Navy and by the Eleventh Naval District, and the deposit of silt in the channel of the creek and upon plaintiff's land, all as hereinabove set forth, proximately caused damage to plaintiff's property; the nature and extent of the injury have not yet been ascertained, and can be fixed only after the proper measure of damages has been determined by this Court, and after additional evidence as to said damages has been presented at a further trial of this action. [35]

Conclusions of Law

I. This Court has jurisdiction of the subject matter of this action.

II. The defendant is not exempted from liability to plaintiff by reason of the provisions, or any of the

provisions, of Section 2680(a) of Title 28 of the U. S. Code.

III. The defendant is liable to plaintiff in damages for the injuries sustained by the plaintiff, as hereafter determined by this Court upon all evidence heretofore and hereafter introduced.

Dated: October 16th, 1953.

/s/ PAUL J. McCORMICK,
U. S. District Judge.

[Endorsed]: Filed October 19, 1953. [36]

[Title of District Court and Cause.]

SECOND SUPPLEMENTAL COMPLAINT FOR
DAMAGES UNDER FEDERAL TORT
CLAIMS ACT

To the Honorable Judges of the District Court of
the United States, for the Southern District of
California, Southern Division:

Adolph G. Sutro, plaintiff, brings this his Second Supplemental Complaint herein, leave having been granted by this Court so to do, against the United States of America, a sovereign power, and alleges that since the filing of the original Complaint and the Supplemental Complaint herein, the following material facts have occurred, viz.:

I.

The defendant continued the course of conduct referred to in the first cause of action in plaintiff's Complaint on file herein, and continued to pollute

the waters of Pilgrim Creek and the wells upon plaintiff's property by the discharge [37] into said creek of large quantities of sewage polluted with bacteria and other poisonous decaying matters, to and including the 21st day of July, 1952; thereafter, although plaintiff frequently requested defendant to give plaintiff some assurance that defendant would not again pollute said creek, defendant wholly failed and refused to give plaintiff any such assurance but on the contrary defendant repeatedly asserted the right to continue to discharge said sewage into said creek and to pollute said creek and the wells upon plaintiff's property.

II.

As a direct and proximate result of the actions of the defendant, plaintiff has sustained damages in addition to the damages alleged in plaintiff's Complaint and Supplemental Complaint on file herein, and since the filing of said Complaint and Supplemental Complaint, in the sum of \$150,000.00.

Wherefore, plaintiff prays judgment against the defendant as prayed for in his Complaint and Supplemental Complaint on file herein, together with the additional sum of \$150,000.00, and such other and further relief as may seem proper in the premises.

GRAY, CARY, AMES & FRYE,
/s/ JOHN M. CRANSTON,
Attorneys for Plaintiff.

Duly verified.

· [Endorsed]: Filed March 4, 1954. [38]

[Title of District Court and Cause.]

ANSWER TO SECOND SUPPLEMENTAL
COMPLAINT

Comes now the defendant, United States of America, and for its answer to the plaintiff's Second Supplemental Complaint admits, denies and alleges as follows:

I.

Answering paragraph I of the Second Supplemental Complaint defendant denies generally and specifically each and every allegation contained therein.

II.

Answering paragraph II of the Second Supplemental Complaint defendant denies generally and specifically each and every allegation contained therein; further answering said paragraph II, defendant denies that plaintiff has sustained damages in the sum of \$150,000, or any other sum, or at all.

III.

Further answering the Second Supplemental Complaint, defendant refers to and incorporates by reference herein its Amended Answer to the Complaint and [40] Supplemental Complaint filed in this cause on May 9, 1952.

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ,

Assistant U. S. Attorney,
Chief, Civil Division;

/s/ LOUIS LEE ABBOTT,

Assistaant U. S. Attorney,
Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 15, 1954. [41]

[Title of District Court and Cause.]

CONCLUSIONS OF THE COURT, AWARD,
AND ORDER FOR JUDGMENT AND AT-
TORNEY'S FEES

A review and study of the oral evidence contained in the 710 pages of the reporter's transcript in conjunction with many of the exhibits introduced in the trial of the novel and intricate issue of damages herein, and the 112 pages of briefs submitted by counsel, in my opinion, establishes plaintiff's right to a total money judgment of \$31,921.36 against the defendant United States of America, with costs of suit herein incurred pursuant to law.

The award of said damages herein is made under the established liability of the defendant pursuant to the Federal Tort Claims Act as adjudged by this court in the initial trial on the issue of liability alone in San Diego, California, and as such liability has been duly entered in the findings of

fact and conclusions of law on file herein, said money judgment is ordered accordingly.

The attorneys for the plaintiff will appropriately and within ten days from notice hereof prepare, serve and present for signature said judgment under the rules of this court.

It is further ordered that because of the necessarily extended and manifold legal services of the plaintiff's [43] attorneys, said attorneys be and they are hereby allowed twenty per cent of said judgment, to wit, \$6384.27, to be paid to said attorneys out of the said judgment of \$31,921.36, as provided in Title 28 U.S.C. 2678.

The items included in the award are as follows:

Loss of rental value on 56.55 acres at \$60.00 per acre for a six-year period, 1946 to 1952.....	\$20,358.00
Loss of rental value on 25.80 acres at \$40.00 per acre for a six-year period, 1946 to 1952.....	6,192.00
Loss of rental value on 18 acres at \$10.00 per acre for a six-year period, 1946 to 1952	1,080.00
	<hr/>
Total	\$27,630.00
Estimated crop receipts during six-year period, 1946 to 1952.....	\$ 8,711.64
	<hr/>
Total Loss of Rental.....	\$18,918.36

Increased Building Costs:

Repair Shop	\$ 5,869.00
Implement Shed	1,540.00
Help House	3,036.00
Storage Shed	2,558.00

Total established allowable increased

building costs \$13,003.00

All other damages claimed by the plaintiff in his previous pleadings, including the supplemental complaint filed during the trial, are under the clear weight of the evidence found to fall in categories of uncertainty, remoteness, infeasibleness, unnecessary, and are respectively disallowed in this action.

Dated June 28, 1954.

/s/ PAUL J. McCORMICK,
United States District Judge.

[Endorsed]: Filed June 28, 1954. [44]

United States District Court, Southern District
of California, Southern Division

No. 1183-SD Civil

ADOLPH G. SUTRO,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT AWARDING DAMAGES AND
ALLOWING ATTORNEYS' FEES

This case came on for trial before the Court without a jury on the issue of liability alone on July 16th and 17th, and July 20th and 24th, inclusive, 1953, and on the issue of damages on September 29, 1953; January 29, 1954; March 1st to 5th, inclusive, and March 8, 1954; and the issues having been tried, pursuant to the findings and conclusions of the Court contained in the Findings of Fact and Conclusions of Law, and the Conclusions of the Court, Award, and Order for Judgment and Attorneys' Fees previously signed and entered herein,

It Is Hereby Ordered, Adjudged and Decreed: That plaintiff Adolph G. Sutro do have and recover from the defendant United States of America, the sum of \$31,921.36, together with his costs of suit herein incurred, amounting to ~~\$258.20~~. (Retaxed \$430.70.)

It Is Further Ordered: That John M. Cranston, and Messrs. [45] Gray, Cary, Ames & Frye, attorneys for plaintiff, be, and they hereby are, allowed twenty per cent of the said judgment, to wit: the sum of \$6,384.27, to be paid to said attorneys out of said judgment for \$31,921.36; said sum of \$6,384.27 is to be charged pro rata against the items included in the foregoing judgment for \$31,921.36 as particularly set forth in the said Conclusions of the Court, Award and Order for Judgment and Attorneys' Fees hereinabove referred to.

Dated: July 29th, 1954.

/s/ PAUL J. McCORMICK,
Judge.

Approved as to form this 29th day of July, 1954.

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief, Civil Division;

LOUIS LEE ABBOTT,
Assistant U. S. Attorney;

By /s/ LOUIS LEE ABBOTT,
Attorneys for Defendant.

Docketed and entered July 29, 1954. [46]
[Endorsed]: Filed July 29, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given That the United States of America, the defendant in the above-entitled action, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Conclusions of the Court, Award and Order for Judgment and Attorneys' Fees entered in this action on June 28, 1954.

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief, Civil Division;

MARVIN ZINMAN,
Assistant United States
Attorney;

/s/ MARVIN ZINMAN,
Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 25, 1954. [47]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given That the United States of America, the defendant in the above-entitled action, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Judgment

of the District Court entered in this action on July 29, 1954.

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ,
Assistant U. S. Attorney;

MARVIN ZINMAN,
Assistant U. S. Attorney;

/s/ MARVIN ZINMAN,
Assistant U. S. Attorney,
Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 23, 1954. [49]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given That Adolph G. Sutro, the plaintiff in the above-entitled action, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Judgment Awarding Damages and Allowing Attorneys' Fees entered in this action on July 29, 1954.

Dated: September 27, 1954.

/s/ JOHN M. CRANSTON,
Attorney for Plaintiff.

GRAY, CARY, AMES & FRYE,
Of Counsel.

[Endorsed]: Filed September 24, 1954. [51]

In the United States District Court, Southern
District of California, Central Division

No. 1183-SD Civil

ADOLPH G. SUTRO,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

REPORTER'S TRANSCRIPT
OF PROCEEDINGS

Appearances:

For the Plaintiff:

GRAY, CARY, AMES & DRISCOLL, by
JOHN M. CRANSTON, ESQ., and
THOMAS ACKERMAN, ESQ.

For the Defendant:

LAUGHLIN E. WATERS,
United States Attorney, by
LOUIS LEE ABBOTT,
Assistant United States Attorney; and
AUGUST WEYMANN,
Special Attorney, Lands Division.

Monday, March 1, 1954, 10:00 A.M.

The Court: Call the calendar, Mr. Clerk.

The Clerk: Yes, your Honor. Case No. 1183

Civil, Southern Division, Adolph G. Sutro v. United States of America, before Judge McCormick.

Your Honor, my record shows that John M. Cranston and Thomas Ackerman are representing the plaintiff, and Louis Lee Abbott, Assistant United States Attorney, representing the defendant. Mr. August Weymann also will be here.

The Court: Yes, Mr. Weymann was also associated of record. Proceed, gentlemen.

Mr. Cranston: Your Honor, may I at this time introduce to the court Mr. Ackerman. He has not previously appeared.

The Court: Yes. I am glad to see you here, Mr. Ackerman.

Mr. Cranston: I will call Mr. Ikemi. He was sworn in San Diego. Is it necessary that he be sworn again?

The Court: Just for the sake of the record, inas much as we have removed from the former scene of action temporarily, I think he had better be sworn again. [712*]

TAIRI IKEMI

called as a witness by and on behalf of the plaintiff herein, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name?

The Witness: Tairi Ikemi.

The Clerk: How do you spell it?

The Witness: T-a-i-r-i I-k-e-m-i.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Tairi Ikemi.)

Direct Examination

By Mr. Cranston:

Q. Mr. Ikemi, you have previously testified in this action at the former hearing in San Diego, I believe? A. Yes.

Q. And you testified at that time that you at one time owned the land which is now owned by Mr. Sutro, and that you had farmed the land?

A. Yes.

Mr. Cranston: May I have this map and chart marked as our next exhibit, for identification, and the photograph marked as our next exhibit, for identification?

The Clerk: Do you know what exhibit numbers they are?

Mr. Cranston: I think our last exhibit was No. 31.

The Court: Whatever it is, it will follow in consecutive order.

The Clerk: Yes, your Honor. This map will be Plaintiff's [713] Exhibit 32, for identification. And is this the chart you refer to?

Mr. Cranston: Plaintiff's Exhibit 31 was the last number, according to the transcript.

The Clerk: And this photograph will be Plaintiff's Exhibit 33, for identification.

(The exhibits referred to were marked Plaintiff's Exhibits 32 and 33 for identification.)

(Testimony of Tairi Ikemi.)

Q. (By Mr. Cranston): Mr. Ikemi, I show you these two documents, which have been marked Exhibits 32 and 33, for identification——

A. Yes, sir.

Q. ——and I ask you if 33, for identification, is a photograph, an aerial photograph of the Sutro property? A. Yes, sir.

Q. Which you formerly owned?

A. Yes, sir.

The Court: Speak a little louder, Mr. Ikemi.

Q. (By Mr. Cranston): This Exhibit 32, for identification, shows certain areas outlined in red, and I will ask you if you can identify the general lay of the land here. I point to an area marked "Pilgrim Creek," and ask you if that represents the way in which Pilgrim Creek flowed through the land you formerly owned and which Mr. Sutro now owns? A. Yes. [714]

Q. And is that the area shown in the photograph, Exhibit 33, for identification, with a black line and three dots—a black line with a representation somewhat resembling two horseshoes, and then a further black and dotted line running towards the bottom of the picture? Is that also Pilgrim Creek?

A. Yes.

Q. Now, calling your attention to these exhibits, at the time you owned the property did you irrigate an area which can be described as a field north of a road which is shown on Exhibit 32 by a dotted line, marked "Dirt Road," and going from there over to the base of the hills, the Santa Margarita fence line,

(Testimony of Tairi Ikemi.)

and running to Pilgrim Creek? A. Yes.

Q. Is that area which you irrigated shown as Field No. 4, enclosed in red lines, on this exhibit, 32 for identification? A. Yes.

Mr. Abbott: If the court please, I would appreciate it if these questions were not leading, unless there appears to be a real necessity for leading questions.

Mr. Cranston: I will endeavor to refrain from that.

Q. (By Mr. Cranston): Now, did you irrigate a main area lying to the west of Pilgrim Creek?

A. Yes. [715]

Q. Can you indicate on Exhibit 32, which is the map, or on Exhibit 33, which is the photograph, the area which you irrigated?

A. Well, it is this area right in here (indicating).

Q. Well, can you describe to the court what those boundaries were?

A. Well, it was bounded by Pilgrim Creek on one side, and there is a range of hills on the north boundary, and our boundary was way down—on the west side it ran right to this, near this Foss Lake, and I would say the south line was surrounded by this Foss Lake.

Q. And the east line would be where?

A. The east line would be Pilgrim Creek.

Q. And the west line would be where?

A. The west line would be—well, I would say it

(Testimony of Tairi Ikemi.)

was the Santa Margarita fence line there, right in here (indicating).

Q. Now, is there a dirt road, or was there a dirt road along the property?

A. Yes. I made it right along the foot of the hills, so that I could get around to all the places there.

Q. Did you farm it as far as the dirt road or not?

A. Yes, I farmed right up to the dirt road.

Q. Can you indicate on this Exhibit 32 the boundaries of this area which you have just referred to? Are they shown [716] on this exhibit by any lines? Is this the dirt road to which you have referred?

A. Yes, that is the dirt road to the—I would say, the north side.

The Court: Did you farm beyond that dirt road?

The Witness: No, I didn't. I farmed on the draw on the north side of the road, but I farmed it dry.

Q. (By Mr. Cranston): Did you irrigate the area between Pilgrim Creek and the dirt road?

A. Yes, that's right, and south near to this Foss Lake.

The Court: Foss Lake?

The Witness: Yes, sir.

The Court: Where would Foss Lake be?

The Witness: It would be right in through here (indicating).

The Court: It isn't indicated by any delineation?

(Testimony of Tairi Ikemi.)

The Witness: No.

Q. (By Mr. Cranston): Did you irrigate as far as the south boundary of your property?

A. Yes.

Q. Now, did you irrigate any areas on the other side of Pilgrim Creek, from the areas we have discussed?

A. Yes. I farmed this No. 5 showing on this map here, and No. 6. [717]

Q. Now, what were the boundaries you referred to as No. 5 on the map?

A. Well, the north end of this property was—it was a range of hills there, and a slope on the east side, and——

Q. Did the dirt road continue across the creek there, the dirt road you previously testified to?

A. Yes.

Q. And did you farm to the dirt road?

A. Yes. Then southward to this other hill, right on the south end.

Q. Showing you Exhibit 33, for identification, can you show on this picture the field that you have referred to as No. 5?

A. Yes. It is this right here (indicating), and this is——

Q. That is, that is an area which is lighter in color than the surrounding area?

A. No, that is No. 5.

Q. Yes. No. 5 is what you have been talking about?

A. Yes.

(Testimony of Tairi Ikemi.)

Q. Between the black line and what is Pilgrim Creek? A. Yes.

Q. All right. Did you farm any other area? Pardon me. Did you irrigate this area?

A. Yes, I did. [718]

Q. Did you irrigate any other areas to the east of Pilgrim Creek?

A. Yes, I irrigated this No. 6 showing on the map.

Q. And does that show on the photograph also?

A. Yes.

Q. Can you indicate where it shows on the photograph?

A. Well, it indicates right here (indicating).

Q. That is indicating the area line between what you have previously referred to as Pilgrim Creek, and another dotted black line? A. Yes.

Q. It is also a somewhat different color than the surrounding area, a lighter color? A. Yes.

Q. Now, what were the boundaries of this field that you have referred to as No. 6?

A. Well, the west side was this Pilgrim Creek, and the east side, the range of hills which is surrounding it to the south, and the north side has this point of the hill coming to this—near this Pilgrim Creek there.

Q. Now, can you describe in general the contour or the elevation of the land that you cultivated, that is, with respect to whether it was hilly or flat?

A. Well, I would say this No. 5 and 6 were flat.

Q. And how was the extent of the area that you

(Testimony of Tairi Ikemi.)

cultivated [719] determined? That is, did you leave additional flat land that you did not cultivate, or did you cultivate to the foot of the hill?

A. I cultivated to the foot of the hill.

Q. Now, there is another area which is shown on this photograph as lighter in color, and a very irregular shape. Can you identify that area on the chart? Is that shown in any area here?

A. Yes, it is right here (indicating).

Q. Did you irrigate that area?

A. Yes, I did.

Q. Now, what were the boundaries of this area which you irrigated?

A. Well, this particular plot of land was like a mesa, flat on top and the sides kind of dropped off, so we were farming right on this mesa here.

Q. Did you irrigate this area you have referred to as a mesa? A. Yes.

Q. Did you irrigate all of it?

A. Yes, excepting right to this point here (indicating).

Q. Indicating a narrow neck of land near a point on the map marked "knoll"; is that correct?

A. Yes, that's right. [720]

Q. I notice that there is a contour marked 145, and then another one marked 138, and one marked 140. With reference to these lines I have referred to, where did you stop irrigating?

A. Well, I would say it was on this 145.

Q. Yes. That is, you did not drop below the area marked 145 on the map?

(Testimony of Tairi Ikemi.)

A. No, that's right.

Q. Now, there is on this map a dotted area with the words "dirt reservoir." What is indicated by that?

A. Well, I had a reservoir—I made a reservoir up there to store some water up there.

Q. You mean that was placed there by you?

A. Yes, that's right.

Q. And you used that in watering the mesa?

A. Yes. No, I didn't, that is, not for the mesa. I had a direct line all the way up to the northern tip of this mesa, to irrigate the mesa, and this reservoir that I had there was more or less for, oh, livestock, and I had a horse—to water the horse, and to irrigate the lower land.

Q. I see. Was this reservoir high enough to irrigate the mesa? A. No, it wasn't.

The Court: Where did you get the water for that reservoir? [721]

The Witness: From the main pump near the house.

The Court: You pumped from the creek, did you?

The Witness: No, this particular property was irrigated from this well that we had—the main well that we had up there.

The Court: Up where?

The Witness: Up by the house.

The Court: Did you hear the testimony in the case down in San Diego?

The Witness: Yes.

(Testimony of Tairi Ikemi.)

The Court: And that house well, is that the one you referred to?

The Witness: Yes.

The Court: That is where you got the water to put in this reservoir?

The Witness: Yes.

The Court: How did you get it down to the reservoir?

The Witness: Well, I had a 10-inch steel pipe up to this reservoir.

Q. (By Mr. Cranston): Did you pump any water into the reservoir from your pump in Pilgrim Creek? A. No, I didn't.

The Court: Before you leave that——

Mr. Cranston: Yes.

The Court: Was that water drinking water? Did you drink [722] that water, or the family drink the water?

The Witness: Oh, yes, we drank this water from the well there.

The Court: That was used for domestic purposes?

The Witness: Yes.

The Court: As well as farming purposes?

The Witness: Yes.

The Court: And the folks didn't get sick, did they?

The Witness: No.

Q. (By Mr. Cranston): Now, at the time you were farming this land, Mr. Ikemi, was there any difference between the land closest to Foss Lake and

(Testimony of Tairi Ikemi.)

the balance of this main area between Pilgrim Creek and the dirt road?

Mr. Abbott: I will object to that question, your Honor, as going into a matter which has already been precluded by the Court's findings. The matter refers to the increase in the water table, which has previously been argued before the court, and the court has previously rejected any findings of liability on that subject.

Mr. Cranston: If the court please, this is not intended to lay any foundation on that point. It is directed to another point, and to the useability of the land under certain conditions. It is directed to the useability of the land if it is properly reclaimed.

The Court: I think that all Mr. Ikemi would testify to [723] is whether he used it or not.

Mr. Cranston: That is what I am trying to find out, whether there was any difference between that——

The Court: Regarding the contours and the water levels, and so forth, unless he is to testify to that, he cannot state whether he used the water.

Mr. Cranston: I want to find out if he used the land. That is what my question was directed to.

The Court: Overruled. We are not going into the issue of silting now.

Mr. Cranston: No.

The Court: We understand each other, do we?

Mr. Cranston: Yes.

The Court: Objection overruled. You may answer the question.

(Testimony of Tairi Ikemi.)

The Witness: Yes, I farmed it.

Q. (By Mr. Cranston): How long have you been a farmer, Mr. Ikemi?

A. Well, ever since I left high school I have been a farmer.

Q. You farmed other land, in addition to this land? A. Yes, I have.

Q. Was this land as good as the other land that you have farmed?

Mr. Abbott: Objection. Far too general. [724]

The Court: Sustained.

Q. (By Mr. Cranston): Have you ever farmed any land that was any better than this land?

Mr. Abbott: I will object to that. We have no basis for comparison. We don't know what the land the witness has farmed is, where it is located, and we don't even know how many parcels he has farmed.

The Court: I don't see how we would have any basis for comparison as far as Mr. Ikemi is concerned. I will overrule the objection, to save time.

The Witness: Well, I farmed in Vista before this, prior to this, and I thought this land was much better, so I moved down there to San Luis Rey.

Mr. Cranston: That is all. You may cross-examine.

Cross-Examination

By Mr. Abbott:

Q. Mr. Ikemi, when did you purchase the land in question?

A. Well, I purchased it in—I don't have the

(Testimony of Tairi Ikemi.)

records, but it must have been in September of 1939.

Q. And when did you sell it?

A. Oh, I didn't sell it. I was evacuated and the bank foreclosed on me, and I lost it because I was evacuated.

Q. How much did you pay for the land when you purchased it? [725]

Mr. Cranston: If the court please, I will object to that as immaterial in this action, what he paid for it in 1939. We are not even concerned with its market value at the present time.

Mr. Abbott: Your Honor, we will establish certain ratios between rental value and fair market value. It is not always possible to establish sales on the precise date or at the same time with which the court is concerned.

The Court: That is about seven years prior to the acquisition by Mr. Sutro.

Mr. Abbott: Yes, your Honor.

The Court: I think that is getting a little far afield. Sustained.

Q. (By Mr. Abbott): Did you farm this land after you returned from evacuation, Mr. Ikemi?

A. No, I didn't, because I had no claim to it after I come back.

Q. What was the last year in which you did farm the land?

A. It was 1942. At the time we were evacuated, I was still farming it.

Q. You at no time farmed the land as a tenant

(Testimony of Tairi Ikemi.)

while Mr. Brown was the owner of the property?

A. No.

Q. Did you farm all of the acreage which you found to [726] be tillable, Mr. Ikemi?

A. Yes.

Q. How many acres was that, in the aggregate?

A. Well, I never had it surveyed, so I wouldn't know.

Q. Can you give us an approximation?

A. Oh, at the San Diego trial, this irrigated land I guessed at 75 acres, but according to figures it must be more.

Q. According to what figures?

A. Of Mr. Sutro's survey.

The Court: I would like to ask a question there.

Mr. Abbott: Yes, your Honor.

The Court: This Exhibit 32 has on it in certain areas certain figures of purported acreage. Do you know anything about those figures?

The Witness: No, I don't. I don't know anything about it.

The Court: Have you examined Exhibit 32 so as to determine in your own mind whether or not that represents the various acreages?

The Witness: Yes.

The Court: And that makes up how much? 75 acres?

The Witness: I thought it was 75.

The Court: You thought the entire acreage that you were farming amounted to 75 acres? [727]

The Witness: Yes; this irrigated land, yes.

(Testimony of Tairi Ikemi.)

The Court: Now, let's be a little more specific. You say this irrigated land. Did you farm other land that you do not classify as irrigated land?

The Witness: Yes, I farmed quite a bit more.

The Court: Dry land?

The Witness: Yes, dry land.

The Court: Did the water supply come entirely from this reservoir that you installed there yourself?

The Witness: No, I pumped that direct, and during the night I would pump some water up to the reservoir, and supplement it during the day, add it on the main line, to irrigate the lower—this lower piece of land.

The Court: Would you pump that water from Pilgrim Creek or from this well?

The Witness: From this reservoir. The water that I put up to the reservoir was pumped from the well by the house.

The Court: But you said you boosted the volume of that water. Where did you get that volume from, that boost?

The Witness: I got this from the well. I didn't get it from Pilgrim Creek.

Q. (By Mr. Cranston): Mr. Ikemi, did you put the red lines on Exhibit 32, for identification, that now appear there? [728]

A. No, I did not.

Q. Do you know who did put them there?

A. I don't know.

(Testimony of Tairi Ikemi.)

Q. Did you participate in the placing of those red lines in order to show where they should go?

A. No, I didn't.

Q. You have testified that in your opinion the irrigated acreage farmed by you was approximately 75 acres. How many acres did you dry farm?

A. I dry farmed an additional, I would say, 75 acres.

The Court: An additional 75 acres?

The Witness: Yes.

Q. (By Mr. Abbott): In your opinion, as a farmer, Mr. Ikemi, were you farming all of the land which could be profitably farmed during that period?

Mr. Cranston: If the court please, I will object to that on the same grounds Mr. Abbott urged to the question I asked Mr. Ikemi. It is too general.

The Court: Overruled. You have been a farmer since you left high school?

The Witness: Yes.

The Court: You look like a young man, but how many years were you farming before you were evacuated?

The Witness: Well, I would say—as an apprentice farmer with my father, I would say I knew about farming, oh, [729] from the age of 15, I was managing my father's farm.

The Court: How old were you when you were evacuated—about?

The Witness: Well, I would say I was——

The Court: Approximately. We are not pinning

(Testimony of Tairi Ikemi.)

you down to any certain number of years.

The Witness: I would say 31.

The Court: 31?

The Witness: Yes.

The Court: You may answer the question. Overruled. Will you read the question, please?

Mr. Abbott: Will you read the pending question, please?

(The question referred to was read by the reporter, as follows:)

“Q. In your opinion, as a farmer, Mr. Ikemi, were you farming all of the land which could be profitably farmed during that period?”

The Witness: Yes.

Q. (By Mr. Abbott): Mr. Ikemi, what buildings did you have on the property during that period which were useful in that farming operation?

A. Well, I had the house, my main house there, and a bunk house for the hired hands, and I had a kitchen for the boys.

Q. Are all of those structures presently on the land, [730] if you know?

A. I don't think so, no.

Q. Which ones are not there?

A. They are all not there, excepting one of the—I went there at one time, and I just noticed one of them that was partially there. It had all been removed, I think.

Q. Well, will you identify which structures were still there when you last saw the land?

(Testimony of Tairi Ikemi.)

A. I think it was the kitchen there was the only one, for the employees.

Q. Was the bunk house still there when you were last on the land?

A. No, it wasn't. It was there, yes, but it wasn't when I returned.

Q. When was it that you last saw the bunk house on the property?

A. Well, at the time of the evacuation.

Q. How large was the bunk house?

A. It must have been 16 by 32.

Q. Was it a frame structure?

A. Yes. It had no foundation at all, I don't think. It was on piers.

Q. What was the nature of the floor?

A. Just tongue and groove.

Q. Did it have any plumbing? [731]

A. No, it didn't.

Mr. Cranston: If the court please, I have no objection to his examining the witness, but I think he is his own witness for this part. This is not cross-examination, but if he wants to go into it as his own witness, all right.

The Court: It is in the record now, but I don't think you had better proceed in that way.

Mr. Abbott: I would like to go into some of these matters with him as my own witness, your Honor.

The Court: If that is the case, you had better call him as your own witness.

Mr. Abbott: I will do it for a limited number

(Testimony of Tairi Ikemi.)

of questions, and then return to cross-examination, if I may.

The Court: If that is satisfactory.

Mr. Cranston: That is satisfactory.

The Court: All right.

Q. (By Mr. Abbott): What were the dimensions of the kitchen, Mr. Ikemi?

A. Well, I don't know. It must have been 12 by 20 and there was an addition of 8 by 12 on the rear side.

Q. Did the kitchen have any plumbing facilities?

A. Yes.

Q. The third building you mentioned was a residence? A. Yes.

Q. That is no longer upon the property? [732]

A. No.

Q. How large was that residence, Mr. Ikemi?

A. I would say it was around 20 by 30.

Q. Was it a frame structure? A. Yes.

Q. Did it have plumbing? A. Yes.

Q. Did it have a bathroom?

A. Well, no, we didn't have good plumbing in there at that time.

Q. Well, it just had running cold water for plumbing? A. Yes.

Q. The same is true of the kitchen, I take it?

A. Yes.

Q. Now, how many tractors did you own and use to farm the land, Mr. Ikemi?

A. Oh, I had two.

Q. Did you have any other self-propelled equip-

(Testimony of Tairi Ikemi.)

ment? A. Yes, my trucks and pick-up.

Q. How many trucks did you have?

A. I had one truck, and a pick-up, and a car.

Q. What kind of a truck was that?

A. I had a Ford truck.

Q. Do you know the loading rating on it?

A. A ton and a half. [733]

Q. And what was the loading rating on the pick-up truck? A. A half ton.

Mr. Cranston: May I have the witness' answers on the last questions, please?

(Record read.)

Q. (By Mr. Abbott): Did you have any mechanical shop equipment which was operated by power of any type?

A. Oh, we don't have power at that time, so we didn't have any sort.

Q. During the period you were farming the land, you testified to having used water from the house well on the upper mesa. What was the source of water for the other areas which you irrigated?

A. This I pumped out of this Pilgrim Creek.

Q. Now, were any of the years in which you were using that Pilgrim Creek water for farming dry years in the area, Mr. Ikemi?

A. Well, after we developed all the land on the bottom there, until the exacuation it was never dry.

Q. You have identified certain areas on Exhibit 32, for identification, as areas in which you irrigated. Going over them one by one, will you tell us

(Testimony of Tairi Ikemi.)

what crops were planted in each of the areas? First, in the area marked "1," what crops were planted there? [734]

A. Well, it varied from year to year. I rotated.

Q. Well, which crops did you grow? Describe them all, if you will.

A. Well, I had tomatoes the first year, and chili the following year, and where I didn't plant the tomatoes the first year, I would have strawberries. I would always plant the strawberries on the land that I didn't put the tomatoes on.

Q. Were there any other crops in that area generally described as 1 during that time that you farmed the land? A. I didn't get that.

Q. Did you grow any other crops in Area 1 besides those you have already named?

A. No. For winter I have raised lots of lettuce and celery.

Q. What crops did you grow in Area No. 4?

A. On No. 4 I raised strawberries, and tomatoes, and chili.

Mr. Abbott: Now, may the record show that from this point forward in the examination this is cross-examination again, your Honor?

The Court: Yes.

Q. (By Mr. Abbott): Any other crops grown in Area No. 4? [735]

A. Yes. I don't know whether I said tomatoes or not.

Q. What crops did you grow in Area No. 5, Mr. Ikemi?

(Testimony of Tairi Ikemi.)

A. Strawberries, tomatoes, and chili.

Q. What crops did you grow in Area 6?

A. I raised tomatoes and chili.

Q. I believe you have testified that you grew no crops in Area No. 2?

A. No, that is a range of hills there.

Q. What crops did you grow on the mesa, which is marked Area No. 7?

A. I raised strawberries, tomatoes, squash.

Q. Are there any other crops that you have grown on the range which you haven't described thus far in your testimony?

A. Cabbage and beans.

Q. Where were they grown?

A. I raised beans on the mesa, and also beans on the lower ground, and——

Q. What kind of beans were those?

A. String beans.

Q. Did you ever grow any black-eye beans?

A. No.

Q. Did you have livestock feeding on the ranch during the period you owned it, Mr. Ikemi?

A. No, I didn't. I just had the two horses that I [736] cultivated with.

Mr. Abbott: No further questions at this time, your Honor.

Redirect Examination

By Mr. Cranston:

Q. Mr. Ikemi, I believe you testified that you had never surveyed this property, and the figures

(Testimony of Tairi Ikemi.)

you have given are purely your own estimates; is that correct? A. That's right.

Q. What crops did you grow on the dry farm property?

A. I just raised tomatoes, the early variety of tomatoes, dry, and grain, hay for the horses.

Q. Mr. Ikemi, will strawberries grow on land which has any alkali or salt content?

Mr. Abbott: I object to that. Counsel is again raising this question of the water table.

Mr. Cranston: No.

Mr. Abbott: It has no further materiality.

The Court: I don't see the materiality of it now. It may become so later. It isn't apparent to the court now. Sustained.

Q. (By Mr. Cranston): Mr. Ikemi, was there any connection between the pump which you had in Pilgrim Creek and the lines leading from the well? Could water be diverted from one to the other or not? [737]

A. Well, on this mesa it could not be diverted, but to irrigate this lower piece of land, that could be diverted.

Q. That is, on the lower land, that could be watered from either source, depending upon which source you wished to use? A. Yes.

Mr. Cranston: That is all, Mr. Ikemi.

Recross-Examination

By Mr. Abbott:

Q. I have one or two more questions. Mr. Ikemi,

(Testimony of Tairi Ikemi.)

as a farmer, have you had experience in estimating acreage by reason of crop return?

A. No, I haven't.

Q. Well, is it your practice to measure the return of your crop in turns of yield per acre?

A. Yes, but I never did get into that.

Q. Mr. Ikemi, what type of irrigation system did you use on this property?

A. This open ditch irrigation, I would say.

Q. And was that true of the entire area which you irrigated?

A. All excepting the mesa.

Q. What system did you use there?

A. Well, I run the water on the flume.

Q. I don't think I understand you. [738]

A. On the flume, or water trough.

The Court: I understood you to say you installed a steel pipe up there.

The Witness: Yes, but it was to divert the water into small furrows to irrigate those vegetables, and I would run it into this open flume, and that had holes in it, and when the crops had enough water, I would plug it up with paper, and divert it to other rows.

Mr. Abbott: We have no further questions, your Honor.

The Court: That open flume, was that earthen?

The Witness: No, it was a wooden trough.

The Court: You built it yourself?

The Witness: Yes.

(Testimony of Tairi Ikemi.)

Redirect Examination

By Mr. Cranston:

Q. Mr. Ikemi, to explain your last answer possibly, how did you get the water to the top of the mesa land?

A. Well, I had a concrete line going three-quarters of the way, and I had a surface pipe to the very north end.

Q. And from there, how did the water go?

A. Well, I irrigated—I run the water into these flumes, which irrigated them.

Mr. Cranston: That is all.

Mr. Abbott: No further questions.

Mr. Cranston: May the witness be excused, your Honor? [739]

The Court: Yes, I think so, unless you want him to remain.

Mr. Abbott: No. I have endeavored to anticipate further testimony. May it be understood if necessary the witness may be called back? I have attempted to go into matters which might be covered, and I hope it will not be necessary to call him back.

The Court: You live down there?

The Witness: Yes.

The Court: You will be available on a day or two days' notice?

The Witness: Well, I couldn't say, I am pretty busy. I have five or six men employed out there right now, and this nurse business that I have gone

(Testimony of Tairi Ikemi.)

into is keeping me pretty busy. I have to get back there as soon as I can.

The Court: They will give you some notice, if they need you. They don't know if they will need you or not.

Mr. Abbott: I don't think it will be necessary, but can you give us your address, Mr. Ikemi?

The Witness: It is 3791 Jefferson Street in Carlsbad.

The Court: I want to ask one further question, Mr. Ikemi. Just be seated, please.

Did you have your family down there in this dwelling house?

The Witness: Yes. [740]

The Court: How much of a family did you have?

The Witness: I had three sisters, and my folks, and my brother.

The Court: Were they all adults—grown?

The Witness: Yes.

The Court: No children there at all?

The Witness: Well, my sister was still going to high school.

The Court: How many folks would that make?

The Witness: And my wife at that time.

The Court: That is how many?

The Witness: And I had—just about the time I was evacuated, well, I had my little daughter.

The Court: How old was she?

The Witness: I think she must have been about 15-months old.

The Court: And the water that was used there

(Testimony of Tairi Ikemi.)

in culinary, in cooking, and so forth, was water that came from where?

The Witness: From the well.

The Court: And you said there was also a bunk house. How many men were there working there?

The Witness: Well, during the strawberries we would have, oh, six to eight men.

The Court: They lived right on the premises, did they, during the harvest time? [741]

The Witness: Yes.

The Court: Did they drink the water that was there?

The Witness: Yes.

The Court: Did they get sick?

The Witness: Never did.

The Court: Did you have to call in a doctor?

The Witness: No, never did.

The Court: That is all.

Mr. Abbott: May I ask one additional question suggested by Mr. Weymann?

The Court: Yes.

Recross-Examination

By Mr. Abbott:

Q. When you were taking water from Pilgrim Creek, Mr. Ikemi, for use in irrigation, were you taking it from surface waters or were you digging some sort of sump or well?

A. Well, I had this concrete well casing down to about 10 feet, and just as soon as it started to get a little low, well, I would lock up the river there, this

(Testimony of Tairi Ikemi.)

Pilgrim Creek, and have a little dam there, and I pumped it out of there.

Q. Did you find any surface flow in Pilgrim Creek during the summer months?

A. Yes, sir.

Q. In the years 1939 to 1942, I take it, that was the case? [742]

A. Yes.

Q. Was it a continuous surface flow during the summer months of those years?

A. Yes.

Mr. Abbott: Thank you. That is all.

Mr. Cranston: That is all.

The Court: That is all, Mr. Ikemi.

(Witness excused.)

Mr. Cranston: Mr. Tedford, please.

CLARENCE P. TEDFORD

called as a witness by and on behalf of the plaintiff herein, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: Clarence P. Tedford.

The Clerk: How do you spell your last name?

The Witness: T-e-d-f-o-r-d.

The Clerk: Thank you.

Direct Examination

By Mr. Cranston:

Q. Will you state your name, please?

A. Clarence P. Tedford.

Q. And what is your present occupation?

(Testimony of Clarence P. Tedford.)

A. Well, I guess I am a farmer. [743]

Q. What was your former occupation?

A. Well, I was with the Soil Conservation Service in Fallbrook, servicing this whole area as a district, conservationist district, from the time the middle San Luis Rey Soil District was formed in '42, I believe it was.

Q. When you say "district," what district are you referring to?

A. Well, included in this controversy here.

Q. That is, including the land owned by Mr. Sutro?

A. That's right.

Q. How long have you been in San Diego County, Mr. Tedford?

A. Oh, about 20 years.

Q. Have you examined Mr. Sutro's property personally?

A. Yes. I have known it since probably, oh, '42, '44, '46, somewheres along in there.

Q. Have you been on it at various times?

A. Yes, numerous times.

Q. Have you made an examination of the nature of the soil upon this property?

A. Yes. Through my soils man, we made a survey of that whole territory, including this ranch, along I believe in 1946, in there some time, outlining all the different types of soil, the slopes, and so forth.

Q. I will show you the aerial photograph which has been [744] marked Exhibit 33, for identification, and ask you if this photograph represents an aerial survey which was used by the Soil Conservation

(Testimony of Clarence P. Tedford.)

office? A. Yes, we made the map.

Q. You made this map in your office?

A. Yes.

Mr. Cranston: At this time, then, I will offer in evidence this particular map. That is, I am not at the present time offering the report, but I believe possibly the map is proper. If Mr. Abbott wishes the legends, that is all right. If he doesn't wish the legends, we can leave that out.

Mr. Abbott: Well, perhaps to obviate any objection we might have, counsel, you might inquire how these various markings got on the top, particularly, the designation of the crop acreage. I don't know if those are actual or proposed acreages, or what.

The Witness: No, they were pretty accurate measurements.

Mr. Cranston: That is, these were simply—this legend is: "Truck, Pasture, and Pasture Proposed." It had not been put there at the time?

The Witness: It had been in crops prior to the time this was made.

At that time they proposed putting alfalfa in here, and using the balance of the top here for various kinds of crops.

Of course, at that time it hadn't—this part [745] wasn't under irrigation, and it could not be irrigated, and this part was questionable (indicating), whether it could be irrigated or not. That is why it was worked out with that in mind.

The Court: Mr. Tedford, where did you get the

(Testimony of Clarence P. Tedford.)
information which led you to make those?

The Witness: From our soils maps.

If I may explain to you, here is your soils classification. You see, it runs from 1, 2, 3, 4, up to 6, and so forth, and your brown areas are your more or less hilly areas, your yellows are your bottom flat lands. They are class 2 lands, and that would determine your field crops principally, and whether you could irrigate them satisfactorily and economically.

The Court: And are those indicated on the legend there?

The Witness: Well, your legend—at the time this was written, that was what they had in mind planting.

The Court: Where did you get that information?

The Witness: Well, from the owner.

The Court: Who was that?

The Witness: Well, it was Mr. Sutro at the time; what he proposed—what he thought he would do.

The Court: Yes.

Mr. Cranston: The photograph is offered in evidence, your Honor.

The Court: As a matter of illustrating it? [746]

Mr. Cranston: Yes.

Mr. Abbott: We have no objection to the photograph and the legends. In the same folder, however, there is a detailed report which government counsel have not yet had an opportunity to read, and, therefore, we would appreciate a reservation at this

(Testimony of Clarence P. Tedford.)

time until we have time in recess, or otherwise, to read that.

Mr. Cranston: Well, that report is not offered at the present time.

The Court: The offer will be received as made.

(The photograph referred to was received in evidence and marked Plaintiff's Exhibit No. 33.)

Q. (By Mr. Cranston): Now, Mr. Tedford, I will show you the map or chart which has been referred to by Mr. Ikemi, which has been marked Exhibit 32, for identification, and ask you if you have seen this before.

A. Yes, I have. It was made in our office. The map was made on my survey. My engineers run all this contour work on it. These are contour—actual contour elevations above sea level, and it gives your steepness of your whole property.

Q. Now, there are certain red lines on the map, and within the red lined areas there are numbers, such as No. 11, to which I point at the present time, and then below that other numbers, "55 ac." [747]

A. Acres.

Q. Can you tell me what is indicated by the red lines and by these pencil notations?

A. Well, in referring to your other map there, you will find that these lines follow very closely to lines of your various land classifications. When you get over to this line, you start up steeper.

This stuff, you can see by the distance between

(Testimony of Clarence P. Tedford.)

your various elevations, there is only 12 inches variation in your elevations. So that you can see from you contour lines is very flat land, and can be irrigated that way. It all slopes pretty well. Well, it is going to take considerable leveling, but you can irrigate it very satisfactorily.

The same thing is true within this area in here (indicating).

Q. Well, that is——

A. Well, these were outlined with the chances they were going to be the areas that could be irrigated satisfactorily and economically.

Q. Now, specifically, what does the figure “55 ac.” mean, and what area is denoted by that?

A. Well, that is the total area of this—the total acre area of this Field 11.

Q. In other words, the No. 11 indicates under your system that this is Field No. 11? [748]

A. That's right.

Q. And it is 55 acres?

A. Included in that field.

Q. Within the red lines?

A. That's right.

Q. Now, No. 6, it then indicates the area within the red lines surrounding that?

A. That's right.

Q. And are there 7.77 acres in that field?

A. That's right.

Q. No. 5 indicates the area within the red lines surrounding it, and it contains 5.95 acres?

A. That's right.

(Testimony of Clarence P. Tedford.)

Q. No. 4 indicates the field contained within the red lines surrounding it, and it contains 6.7 acres?

A. That's right.

Q. And No. 7 indicates the area contained within the red lines surrounding it, and it contains 17.72 acres?

A. Right.

Q. In addition to those fields which were referred to by Mr. Ikemi, in his testimony, there is an area called No. 1, containing figures 2.2. Does that indicate that field contains 2.2 acres?

A. That's right.

Q. And another field marked No. 2. Does that [749] contain 2.77 acres?

A. That's right.

Q. Another marked No. 3. Does that contain 1.09 acres?

A. Yes, sir.

Q. And then going to the other end of the map, there is a field marked No. 8, with the mark "3.01 ac." Does that contain 3.01 acres?

A. It does.

Q. And what is the boundary line between Field No. 8 and Field No. 7?

A. Well, it is right here (indicating).

Q. It is the 145 foot contour line?

A. That's right.

Q. Then there is a field marked No. 9. Does that represent that area within the red lines surrounding it?

A. That's right.

Q. And the acreage is 13.25?

A. That's right.

Q. And No. 10, does that contain 28.4 acres?

A. That's right.

(Testimony of Clarence P. Tedford.)

Q. These were actual measurements made by you?
A. They are.

Q. Now, what determined the boundaries, say, of Field No. 1 and Field No. 2? Why is the line drawn where it is instead of including all that in one area? [750]

A. It is a little too steep, and the soil isn't quite as good?

Q. What is too steep?

A. This area in this here (indicating).

Q. That is the area between Fields Nos. 1 and 2?

A. Yes. It is pretty badly eroded, and it would hardly pay to try to do anything with it, that is, so far as cultivation is concerned.

Q. Is the area within Field No. 1 suitable for irrigation, or is it not suitable?

A. It could be irrigated, but it would be a chore. I would say these two are too steep for economical irrigation.

Mr. Abbott: Let the record show that the witness has pointed to areas 1 and 2 in the upper left-hand corner of the chart.

The Witness: They could be irrigated, but it is probably not economical. The soils are good.

Q. (By Mr. Cranston): That is, it would require more labor to irrigate those?

A. That's right.

Q. Now, what about the fields marked 8, 9, and 10?

A. They could be irrigated very nicely. I should not say very nicely—very easily.

(Testimony of Clarence P. Tedford.)

This could be very nicely. You can see your contours on it. There isn't much fall, more than what you call the mesa. [751]

Q. That is, not much more than No. 7?

A. No. It would irrigate.

The Court: I didn't hear that.

The Witness: I say those Fields 9 and 10 would irrigate nicely, as easily as Filed 7, due to the slope of them.

The Court: Could they be irrigated so as to produce crops economically and profitably?

The Witness: Well, there you have got a question. Your soil types are a little bit different. Possibly yes, They could not be cropped two crops a year, like they do on a lot of those properties. They are harder soils to operate. They have to be handled just at the right time. They are Diablo and clay soils, which are very rich soils, although they have to be handled just right, and have to be irrigated just right. It takes more time to do it. It could be worked in very nicely, I think, if the water was available.

The Court: You mean it is feasible, or it is economically probable?

The Witness: I think it is feasible.

The Court: I guess any land down in that vicinity is feasible for irrigation if you have the water.

The Witness: Well, with the exception of too much erosion. You have to get your water across these ditches, and that is an economical impossi-

(Testimony of Clarence P. Tedford.)

bility in lots of cases. I don't think that in there is eroded very much. It is stuff that had been [752] planted to grain crops.

Q. (By Mr. Cranston): I think I neglected to ask you about Field No. 3. It is a small one with 1.09 in it.

A. That is too steep to economically put into irrigation, I would say.

Q. Now, what is the nature of the soils comprising the Sutro property? Have you determined the nature of the soils, and the approximate acreage in each type?

A. You have 2, 4, 6—7 different types of soil on the property. Those differentials are very slight in some cases.

For your bottom, you have a Hanford and a Foster type soil, and there is a soil map on there somewhere right on top, if you want to get it.

It breaks in here (indicating). Then you have a Tujunga. That follows down in this area in here, and comes across there (indicating), which is a sandy soil.

That is your three soils in this bottom here, and you have got some of it in some of your deeper soils in there.

Q. About how many acres are there of each of those types?

A. You have 27.5 acres of Hanford, you have 22 even of Foster, and you have 33.8 of Tujunga, which are excellent types.

Q. Did you mention Greenfield? [753]

(Testimony of Clarence P. Tedford.)

A. Your Greenfield is up on this mesa.

Q. And how many acres of that?

A. In Greenfield you have 35 acres.

Q. And what other types of soils are there?

A. Besides you have a little Botella, that lays in here (indicating), which is an excellent soil, but it is a little steep.

Q. That is in Field No. 2?

A. Yes. Then you have your Diablos here in Fields 9 and 10 in here (indicating).

Then you have Merriam soils, and your Diablos run in right close along Camp Pendleton there. There is some Diablo in here (indicating).

Q. Is that a desirable soil?

A. It is a very desirable soil. It is adobe. You know what adobe is. It is a strong soil. It has to be worked just right, and has to be irrigated just right, but it is strong soil, and will raise wonderful crops if properly handled.

Q. What about your Greenfield soil?

A. It is an excellent soil.

Q. That is in Field 7?

A. That's right; and there is 35 acres of Greenfield.

Q. That is, it covers this area plus other areas?

A. Well, it runs down on your slopes a little more than this shows here. It doesn't just exactly follow this [754] field. It includes that field, and some additional.

Q. Additional area which is on a steeper slope?

A. On probably a little steeper slope. It is an ex-

(Testimony of Clarence P. Tedford.)

cellent soil. It is a deep soil, and can raise any kind of crops. It is an easy soil to handle. It is a tough soil, and very similar to your Hanford and Foster.

Q. What about the Hanford soil and the Foster soil?

A. They are an easy soil to work. They are very deep, hold moisture very well, and will raise an excellent crop.

They are—we consider them as a crop soil. They are probably the best. And your Foster is just about the same. It is a little finer texture is the only thing. That is the only difference between your Hanford and your Foster. They are both excellent soils.

And your Tujunga—your Tujunga was classified Tujunga because of the overburden from the deposit from the creek.

Q. What is the Tujunga soil?

A. It is a sandy soil. It is just a deposit from your creek.

Q. Now, have you been on Mr. Sutro's property recently?

A. I was over it some time last week.

Q. Now, at the time that you were there, did you observe that part of it had been rendered alkaline?

Mr. Cranston: I have your Honor's ruling in mind.

The Witness: Yes. [755]

Q. (By Mr. Cranston): Is it possible by proper drainage facilities to restore that soil to production?

Mr. Abbott: Your Honor, I must make the ob-

(Testimony of Clarence P. Tedford.)

jection for the record. Counsel says he has the court's ruling in mind, and I respect counsel's opinion there, but I know of no other materiality there other than once again raising the question of the water level at Foss Lake.

Mr. Cranston: Maybe I might explain this both to counsel and the court. This is not to obtain damages by the raising of the water level, particularly, in the raising that occurred prior to Mr. Sutro's purchase of the property, and in deference to your Honor's ruling we will waive the claim for damages due to raising the water table afterwards. The purpose is to establish the fact that the land could be drained, and, therefore, that being the case, I believe we are entitled to recover as damages the damages of the cost of draining it in 1946, when we purchased the property, and the cost of the present date so as to restore it to cultivation. That is, we are not claiming damages because it was rendered alkaline, but merely the damages between the cost of restoring it to production at that time and the cost of restoring it to production now.

Mr. Abbott: Your Honor, I don't want to be premature, but we will enter the objection to any such evidence, and this goes for all other evidence of a similar character, that there [756] has been no showing here, nor do I anticipate there will be a showing, that the land could not have been farmed in 1946, and that the draining could not have occurred in 1946, and, therefore, there is no reason in

(Testimony of Clarence P. Tedford.)

fact or in law for not doing the work in 1946, if it was an economic project at all.

The Court: I am inclined to agree with that situation. The objection is sustained.

Mr. Cranston: Is your Honor open to argument?

The Court: Not to argument. I am open to a change of view, if there is any substantial reason for doing so. I think that is getting into speculative and prospective avenues that would lead us into an invasion of the other ruling of the court.

Mr. Cranston: Well, in deference to your Honor's ruling, may I state this: That we do intend to establish by testimony that Mr. Sutro from the very time he purchased the property intended to drain that land.

The Court: When we hear Mr. Sutro testify, we will be better able to evaluate that phase of the situation.

Mr. Cranston: I was wondering whether we could simply get maybe one or two answers from Mr. Tedford, so he would not have to be called back from Vista, subject to a motion to strike if the court later determines it should be stricken.

The Court: We will accommodate Mr. Tedford as much as we can without jeopardizing the record. Perhaps the best way will [757] be to tentatively hear the evidence, subject to a motion to strike. I have it clearly in mind, and I am not going to receive the matter. But inasmuch as we want to save Mr. Tedford's time, we will hear what

(Testimony of Clarence P. Tedford.)

he has to say now, subject to a later motion to strike.

Mr. Abbott: Thank you, your Honor.

Q. (By Mr. Cranston): Mr. Tedford, in your opinion, could that land be drained?

A. Very definitely, yes, I think.

Mr. Abbott: Can we identify with precision the land to which that answer was referring?

Q. (By Mr. Cranston): Is there any portion of the land owned by Mr. Sutro which could not be so drained?

A. Well, no, I think any part of it could be drained.

Of course, there would be the areas from, oh, in here somewheres (indicating), south.

Q. That is the area which has been rendered alkaline?

Mr. Abbott: I will object to that as assuming a fact not in evidence.

Q. (By Mr. Cranston, continuing): Or, in part, which needs to be drained?

A. Well, it would be the areas in here (indicating).

The Court: Where is that, Mr. Tedford?

The Witness: That would be in Field No. 11, and probably would be—to put that back into good production would [758] be not over, I suppose, maybe a half or two-thirds of that field, plus a part of this field here that is alongside of it, of the drainage.

Q. (By Mr. Cranston): Now, how long would it

(Testimony of Clarence P. Tedford.)

take to perform that operation?

A. To put in the tile?

Mr. Abbott: May it be understood the same objection is tendered to all of these questions?

The Court: Yes, and it is received for the same reasons, with the same understanding that a motion to strike will be considered.

Mr. Cranston: Yes, your Honor.

The Witness: I don't quite get your question. How long——

Q. (By Mr. Cranston): About how long an operation would you estimate it would be to drain the field in that fashion?

A. Well, it would probably take a year; maybe two years. The way that would have to be done, there would have to be a pump run into a sump, and pump the water away, because you would have to get down below your water sea level here. So your drainage would have to be run to a low point here, with all the drains coming into that portion, and raising it so that it goes in the river. That is the only way to get rid of it. But we have done a lot of it by putting in dikes—putting in a tile system and throwing up dikes, and letting [759] them flood, and then pumping it out, and doing that three or four times, and then it will pretty well clear up your alkali condition. I don't think your alkali conditions are going to be too bad, too hard to correct them. But that's the only way to get rid of it that I know of, due to the lack of drainage that we have here.

(Testimony of Clarence P. Tedford.)

Q. Mr. Tedford, did you discuss this property with Mr. Sutro, about the time he purchased the property?

A. I believe it was then, I think I talked with him. I think he came into our office in regard to it. I had worked with Mr. Brown a little bit prior to Mr. Sutro's purchase, and I knew the property at the time, and I had helped Mr. Brown on little things, on his pumping, and one thing and another, and apparently Brown had mentioned my name, and Mr. Sutro called at our office, and I went over to the ranch and went over the ranch with him.

Q. I show you what purports to be a copy of a letter dated December 8, 1945, from Mr. Sutro to you, and ask you if you received the original of that letter on or about the date it bears

A. I believe I did. I think I have a copy of it in our files in the office.

Mr. Cranston: I will offer this in evidence as our next exhibit.

Mr. Abbott: I object. It is hearsay. [760]

Mr. Cranston: The only purpose is to establish the date, and that the conversations occurred at or about that time.

Mr. Abbott: I am going to object to the conversations for the same reason.

Mr. Cranston: That there was a conversation?

The Court: He testified that he had a conversation.

Mr. Abbott: Well, if it is being offered solely to establish the date of the conversation——

(Testimony of Clarence P. Tedford.)

Mr. Cranston: Yes, it is to establish that the conversation occurred at or about that time.

The Court: Then I will not read the letter. Does the date about correctly state the time?

The Witness: Yes, I believe it does, if I remember. I think we have it in our files, too.

The Court: I don't think that is admissible. The objection is sustained to the letter. The date has been fixed. I think you could read that date.

Mr. Abbott: I have no objection to the witness using it to refresh his memory as to the date.

The Court: Do you wish it marked for identification?

Mr. Cranston: Yes.

The Clerk: 34, for identification.

(The document referred to was marked Plaintiff's Exhibit No. 34 for identification.)

The Court: We didn't get your answer. [761]

The Witness: I will say that I did receive that letter, yes, on that date or very shortly thereafter.

Q. (By Mr. Cranston): Now, at or about the time Mr. Sutro bought the property, and about the time of that letter, did Mr. Sutro have a discussion with you concerning a site on the property for a dam?

Mr. Abbott: Hold your answer, please. I will object to that, your Honor, as being hearsay, with no proper foundation, and no exception applicable to such evidence.

The Court: Sustained at this time.

(Testimony of Clarence P. Tedford.)

Mr. Cranston: Your Honor, it is to establish the fact that a conversation occurred. I did not intend to go into the nature of the conversation.

Mr. Abbott: Counsel has discussed the subject matter and its general purport in his question.

The Court: I think so. That is not the proper way. This proceeding must be conducted orderly, and this is putting the cart before the horse. Sustained.

Mr. Cranston: Very well.

Q. (By Mr. Cranston): Mr. Tedford, have you made an examination of Mr. Sutro's property to determine what amount of land moving or excavation would be required in order to irrigate the property in the most advantageous manner?

A. Well, that was the reason this map was originally made, this contour map, to lay out and find out just about [762] what would be necessary to do it, and put in on an irrigation grade. At the present time, the ranch is all staked out now for grading.

Q. Then is the answer to the question yes, that you have made such an examination?

A. Yes, we have made such a survey and study.

Q. What amount of excavation per acre would be required for such purpose?

Mr. Abbott: At this point, your Honor, we will object. This is entirely irrelevant and immaterial. I assume that counsel intends to discuss costs, and there is no showing that the work which had been discussed could not have been performed economi-

(Testimony of Clarence P. Tedford.)

cally and advantageously in 1946, and used to its ultimate at that time.

Mr. Cranston: If the court please, I believe it will be the showing that in 1946 the water supply had been condemned and the land could not be used for such crops, so there would certainly be no reason to go to the expense of performing the precise leveling here involved, and the land could not be used for an indefinite period, and would be subject to erosion,

Mr. Abbott: Quite to the contrary. The evidence, including this exhibit, shows there were many purposes for which the land could be used, and that the witness recommended alfalfa, grain, and grain on the major areas. Those are the irrigated [763] crops.

The Court: I haven't read the report at all. I haven't seen it, and don't know what it contains, and I thought it had been excluded at the time of the objection.

Mr. Abbott: Only the report. But the chart and the legends contain certain matters, which contain the recommendation and/or the statements of Mr. Sutro as to the proposed use of the land. The crops there described and many other crops could be grown which would not be prohibited by Bulletin 59.

The Court: I think the order of proof should be a little different in the situation. I want to accommodate Mr. Tedford as much as the court can without prejudice to the orderly method of trial, but I

(Testimony of Clarence P. Tedford.)

think it is all anticipatory at this time, and for those reasons the objection will be sustained.

Mr. Cranston: Very well. Then I believe that would conclude my direct examination of Mr. Tedford at this time, subject to my right to recall him after I have asked Mr. Sutro certain questions.

The Court: I am not saying that you will have the right, but you have reserved the right so that you may do so.

Mr. Cranston: Yes.

Cross-Examination

By Mr. Abbott:

Q. Mr. Tedford, you have testified you measured certain areas on the Sutro land. Was that done with a surveying crew? [764]

A. This map was made with a surveying crew. In measuring the land, it was done with a polimeter.

Q. How were the red lines done? Were they done with the aid of surveying measurements?

A. Yes. When the boys were running these different fields for their contours, they outlined them so that they are accurate so far as distance is concerned, and the polimeter is about the best way we know of establishing it. Oh, you might miss the area by a tenth, or something, but that is so trivial I don't think it makes much difference. We find the polimeter is the thing to use in general practice, in all engineering.

Q. Did you yourself put the red lines on the map, or did someone in the Soils Office do that?

(Testimony of Clarence P. Tedford.)

A. No, the engineer did.

Q. Now, will you kindly state what, in your opinion, constitutes a gradient in the subject property too steep to be suitable for irrigation?

A. Now, you are taking in a number of things. Your soil type would mean everything so far as irrigation is concerned. It would mean an awful lot. Of course, when you get up to over more than 25 per cent, why, it is a job to hold water on a hill. Of course, it would all have to be contoured. Your irrigation would have to be contoured on any of these.

Of course, any of it that is level, that would probably be [765] level enough to be flood irrigated. But fields of this type, any of this type, would have to be contoured.

Q. Let the record show the witness is pointing to the mesa area marked No. 7. Pardon me. If the reporter does not pick up these indications, it isn't in the record.

A. That would be the picture on the mesa area. They would probably run a pipeline up to it, and, of course, as Mr. Ikemi did, work their flume ditches down, and take their water up sideways.

Q. Speaking now of the mesa, in particular, and the land there, what is the maximum gradient which will permit economic irrigation of the land?

A. Well, as I say, 25 per cent is just about maximum.

Q. Well, is 25 per cent, in fact, the accurate gradient, having in mind the characteristics of the mesa and its soil, or would it be some other figure?

(Testimony of Clarence P. Tedford.)

A. Your mesa hasn't any land on it as steep as 25 per cent. That is all flatter land. That isn't over 6 or 8 per cent. Here (indicating) you have only 2 per cent, or 1 per cent. It is flat land.

The Court: That is in areas 1 and 2 you were looking at?

The Witness: Yes.

Q. (By Mr. Abbott): You have submitted a report, which is attached to Exhibit 33, for identification. Will you please state what the circumstances surrounding the preparation [766] of that report were. In other words, is that something which represents your own plan for the use of the land?

A. No. If I may, I will explain how those farm plans are made.

At the time this was made, Mr. Sutro had in mind planting alfalfa, and working it out as this was. That doesn't mean that you couldn't plant any other kind of crops in there. It was just something for him to go by, from what he had in mind at that time.

Now, three years later he may come back and revise that. We would review that as to the possibility of some other crops.

Q. But this is an available plan, or some plan of Mr. Sutro's?

A. Yes, we submitted it to Mr. Sutro, yes, in this case.

The Court: Now, let's understand that. From whom did the data come that led your organization

(Testimony of Clarence P. Tedford.)

to make this study?

The Witness: Mr. Sutro.

The Court: You would not have made it on your own initiative?

The Witness: No, we don't go on the farm unless they request it. It is just a working agreement that we give the rancher. We try to work him out whatever he wants to have worked out, and bring out the points that possibly he should [767] know regarding the soils, the slopes, the irrigation, and things of that kind.

Q. (By Mr. Abbott): But where the report designates certain crops for certain acreages, is that data which you have secured from Mr. Sutro?

A. That he gives, that information, that he intended to use that property, those fields, for those crops at that time.

The Court: Which was along about in December of 1945?

Mr. Cranston: No, your Honor.

The Witness: No, this was in—this was, I believe, oh, in '51.

Mr. Abbott: This is dated October 16, 1951.

The Court: I am not speaking of the date of the report. I am speaking of the date when Mr. Sutro contacted you or your organization to make this study.

The Witness: Well, he had contacted us a number of times about various things; oh, reservoirs, irrigating systems, wells, and so forth, and, of course, at the time Mr. Sutro was living in San

(Testimony of Clarence P. Tedford.)

Francisco, and we would see him probably once or twice a year, so there was probably a delay of some kind.

Q. (By Mr. Abbott): In your opinion, was the plan proposed by Mr. Sutro, which you have discussed in some detail here, an economically feasible plan? A. Very definitely. [768]

Q. Now, was it a plan which made the best or something close to the best use of the land?

A. Well, you could probably—it all depends on how you want to farm. You could go into more concentrated crops, probably, and make twice as much money out of it if you figured from that angle, but with him away, and with him only here a part of the time, probably that was the best crops for him to put in at that time.

Mr. Abbott: I have no further questions.

Redirect Examination

By Mr. Cranston:

Q. Mr. Tedford, land upon which alfalfa can be grown may also be used for growing other crops, may it not? A. Very definitely.

Q. In your opinion, what other crops could be grown upon this property which was referred to——

A. Field 11?

Q. ——on this Exhibit 33 with the indication “Truck Crops and Pasture Proposed”?

A. Well, that would—truck crops and pasture—oh, you could grow, if it was irrigated, you could

(Testimony of Clarence P. Tedford.)

grow most anything. If they did not irrigate it, you could grow possibly grain, possibly some winter vegetables. That is above frost line. You could also grow possibly a dry bean crop by getting it in early. [769]

Q. And in the area marked on this map, "Alfalfa," could other crops be grown other than alfalfa?

A. Practically any crops could be grown there. You could grow truck crops. You could grow corn, or practically any crop. That is a soil that would take any crop that would not be affected, unless a crop that would be planted in the spring and summer.

Q. Now, was this particular map, the chart, prepared in 1945 or 1946?

A. No. I believe that program was worked out—I think that was probably worked out, oh, very close to the time of that date, October, '51, or probably a little before that time.

The Court: You are referring to Exhibit 33, now, aren't you, Mr. Tedford? That is the exhibit?

The Witness: That is, yes.

Q. (By Mr. Cranston): You say that was prepared somewhere near that date?

A. Oh, somewhere near that date of approval, yes.

The Court: In 1951?

The Witness: Yes, although we had worked with Mr. Sutro a number of times prior to that.

The Court: Before you leave that subject, in

(Testimony of Clarence P. Tedford.)

order to save as much time as we can properly, do you remember when the sewage effluent was taken over the hill into the Santa [770] Margarita River?

The Witness: I remember the time, whether I can remember the date or not.

Mr. Abbott: The record shows, your Honor, if I may say——

The Witness: It is about four years ago, I think.

Mr. Abbott: July, 1952.

The Witness: Oh, was it that date?

The Court: So this study, or this memorandum, whatever it is, was made before that?

The Witness: Yes, it was. They had the sewage disposal. That was one reason they went into alfalfa there, so that they could use that water. You see, they were stopped on truck crops there by the Health Department.

Mr. Abbott: Yes.

Mr. Cranston: I have no further questions, your Honor.

Recross-Examination

By Mr. Abbott:

Q. A moment ago, in response to Mr. Cranston's questions, you named a few crops which could be grown on the area marked with the roman numeral 2 on the map which is marked Exhibit 33, for identification. Could that also be used to grow flowers?

A. Yes.

Q. Was it suitable for that purpose?

(Testimony of Clarence P. Tedford.)

Tedford, and I will assure you the court will assist you as much as it can. It cannot control the way they ask questions.

Mr. Cranston: Your Honor, I would like at the present time to call Mr. Sutro to ask him certain questions in order, if possible, to allow any further questions which would be asked of Mr. Tedford to be asked today, and then I would like to reserve the right to again recall Mr. Sutro at a later time on matters which will not bear upon Mr. Tedford's testimony; in other words, introducing a part of his testimony now, and a part later, if that is acceptable to the court and counsel.

Mr. Abbott: I have no objection, if that will assist.

The Court: If that will facilitate and properly expedite the case, of course, I would desire it be done, and if it does not, I desire that it be not done.

Mr. Cranston: If I waited to examine Mr. Sutro upon every [774] phase, it would not be possible for Mr. Tedford to testify again today. In order to have him testify today, I would have to ask Mr. Sutro only certain questions.

The Court: With the understanding that is not the procedure to be followed throughout the case, but only with respect to the matters that Mr. Tedford will testify to, that will be satisfactory.

Mr. Cranston: Yes.

The Court: Yes.

(Witness temporarily excused.)

Mr. Cranston: Then I will call Mr. Sutro to the stand.

The Court: He has been sworn before.

ADOLPH G. SUTRO

recalled as a witness by and in his own behalf, having been heretofore duly sworn, was examined and testified as follows:

The Court: You were sworn in San Diego, I think, twice, weren't you, Mr. Sutro?

The Witness: I don't recall the second time, your Honor. I was sworn.

Direct Examination

By Mr. Cranston:

Q. Mr. Sutro, you purchased the property in question at what time? [775]

A. The deed to the first parcel was recorded January 17, 1946. The deed to the second parcel, the time of record appears in the transcript, but I do not have it in memory. I don't have it in my mind.

Q. Was it in the early part of 1946?

A. I believe it was February, 1946.

Q. At or about the time that you purchased the property, did you consult with the Soil Conservation Office? A. Yes.

Q. At that time did you consult with Mr. Tedford in that office? A. Yes.

Q. What points did you discuss with Mr. Tedford at that time?

Mr. Abbott: I will object, your Honor, as being

(Testimony of Clarence P. Tedford.)

hearsay evidence and no proper foundation.

The Court: I think the foundation has been pretty well laid. I don't think that is hearsay. Overruled.

The Witness: Various conditions pertaining to the ranch, including the location of a desirable damsite.

Q. (By Mr. Cranston): Did Mr. Tedford at that time offer you assistance in determining the location of such a damsite?

A. Yes. The situation, as it existed at the time of my purchase of the ranch, was that we were not officially in the Soil Conservation District. It happened that the area of [776] the district ended at the borderline of my ranch, but Mr. Tedford was kind enough to assist us, even though we were not within the boundary.

Q. Did you discuss with Mr. Tedford at that time the location of any other irrigation facilities?

Mr. Abbott: Your Honor, we object, not only because this is hearsay, but also because it appears to have but one purpose, and that is to introduce evidence relative to increased costs of certain agricultural installations—I am sure that is counsel's purpose—and with respect to evidence of that type which may encompass many particulars in this trial, we have several objections to delineate to the court.

First, such evidence is highly speculative and is wholly without precedent in the law by counsel's own statements in this court. Such evidence with

(Testimony of Adolph G. Sutro.)

respect to the particular type of installation now under inquiry is obviously immaterial for the further reason that there has been no showing, and presumably in the light of the evidence prior to this time, there can be no showing that the installations and improvements contemplated were not equally desirable for the land, subject to whatever limitations on the water existed at the time of the purchase of the property. Certainly, these lands were equally suitable for alfalfa, for vegetables grown for seed or for flowers, or for any other purpose the land could [777] be used for. For all of those reasons we think the evidence is objectionable.

The further speculativeness of the nature of the evidence is demonstrated by the theory of the plaintiff that as a result of this situation he was deprived of the buying power of the dollar, so that when he later bought, he could not buy at the same price. There is no showing that money used for this purpose was not invested in some other investment which gave him an equal return, such as he would have received from strawberries, or other crops which would be of equal value. There are so many speculative aspects to this question that we submit it could not be received on the measure of damages suffered by the plaintiff in this action.

The Court: The court has already ruled upon some of the aspects of this evidence. That all goes, in my judgment, to the weight of the evidence, and not to its admissibility. I do not mean by that to say that a person, even under a most liberal view

(Testimony of Adolph G. Sutro.)

of the Federal Tort Claims Act, can say, "Well, I wanted to do this, and I was prevented from doing it, and I could only do that."

That, in my judgment, would bring into the law an uncertainty that would not establish any standard at all. There would be no standard of estimating damages under the Federal Tort Claims cases if that were the rule. But it is still a matter that goes to the weight of the evidence, I think, and [778] your objection has been adverted to during the argument, and the court has made a ruling on it. I think we will adhere to that ruling. The objection is overruled.

Mr. Cranston: Will you read the last question, Madam Reporter?

Mr. Abbott: So that we may not be repeatedly interrupting, your Honor, may it be understood that the objection to competency, relevancy, and materiality of all this evidence relative to building costs is tendered by the government?

The Court: It may be understood that the same objection has been made, and without making it again in extenso, it is also understood that the same ruling is made that has been announced by the court, that it is a question of the weight of the evidence, and not its admissibility.

Mr. Abbott: Thank you, your Honor.

(The question referred to was read.)

The Witness: I may have discussed with him the

(Testimony of Adolph G. Sutro.)

location of a diversion works on the creek. In fact, I think I did.

Q. (By Mr. Cranston): Did you discuss with him the location of a reservoir?

A. Yes, that was the purpose of the damsite, to form a reservoir.

Q. Can you explain that, Mr. Sutro?

A. May I illustrate it on the map? [779]

Q. Yes.

A. The object was to impound the greatest amount of water at the lowest possible cost. The most suitable place on the ranch was in this area here (indicating), with a dam across the narrowest point.

Q. Mr. Sutro, may the record show that you are indicating an area to the right of the field marked No. 5 on Exhibit 32, on a line that you indicated was apparently about even with contour—which contour mark there?

A. My recollection is the 75 foot contour.

Q. And the dam would be located where?

A. On that contour, directly across this place (indicating).

Q. Now, what about the reservoir site that you discussed with him?

A. There was a small day reservoir proposed at a location near the top of the mesa.

Q. And when you say "the mesa," you are referring to? A. To Field No. 7.

Q. Now, you discussed those features with Mr. Tedford shortly after you purchased the property;

(Testimony of Adolph G. Sutro.)

is that correct? A. Yes.

Q. Going back prior to the time that you purchased the property, I believe you stated at the former hearing that you had examined properties in various portions of California? [780]

A. Yes.

Q. And you made that investigation over a considerable period of time? A. Yes.

Q. What steps had you taken to ascertain what properties might be considered by you?

A. Among other steps, I had written the various county farm advisors in different counties asking them in regard to quality of soil, availability of water, and climatic conditions.

Q. At that time were you interested in ascertaining whether the property was or was not within the boundaries of an irrigation district?

A. My letters specifically asked regarding property which was not included within the bounds of an irrigation district.

Q. Why were you interested in that question?

Mr. Abbott: Really, your Honor, isn't this going rather far afield, when we inquire into the plaintiff's mental processes in selecting this property?

The Court: Yes, I think that question is objectionable. Sustained.

Q. (By Mr. Cranston): Were you interested, Mr. Sutro, in finding land which could be irrigated with a minimum cost? [781] A. Yes.

Q. Did you have in mind at the time you pur-

(Testimony of Adolph G. Sutro.)

chased any general method to be used in irrigating the property that you purchased? A. Yes.

Q. What system was that?

Mr. Abbott: Well, your Honor, I don't like to keep interrupting, but once again we are going into the discussion of the mental process of the person selecting the property. We assume he liked the property or he would not have purchased it.

Mr. Cranston: My purpose, if I may say, was that at the time Mr. Sutro purchased he had certain definite thoughts in mind; that he took action immediately to carry out his intentions and that the activities of the United States prevented him from doing what he had had in mind. The purpose is to establish that this is no afterthought, but that it was intended at the time of the purchase, and that he was prevented by the government's acts. I know of no other way in this particular matter than by examining Mr. Sutro as to what he did have in mind, and he can support it by certain documents.

The Court. He has already testified to what he had in mind in San Diego over a considerable period of time.

Mr. Cranston: Not as to the details of the system to be [782] installed, which is what this goes to; in other words, to the elements of the irrigation system which he would install, consisting of a dam, a reservoir, pipes of certain sizes, capacities, and so forth.

Mr. Abbott: Your Honor, this very problem points up the difficulties we encounter in measuring

(Testimony of Adolph G. Sutro.)

damages in this manner. Mr. Sutro may testify that he intended to reconstruct Sutro Baths in this area, and we have no way of gauging that evidence or of testing it.

The Court: Of course, if he made any such statement, the court would know sufficient about the location of the property to disregard it. I do not want to foreclose the plaintiff from eliciting any proper subject matter that is capable of cross-examination, but it seems to me that we are getting into the realm of mental operations as to which, without the power of divination—and I don't believe even government counsel has that power—we cannot ascertain anything concerning it which would be of evidential value in the case.

Mr. Cranston: Well, your Honor, I believe we have certain documentary evidence which will substantiate Mr. Sutro's statements.

The Court: Then let's get at that.

Mr. Cranston: But they could only be introduced, I take it, to support a statement which has been made, and also the [783] testimony of Mr. Tedford, which I believe will substantiate certain portions, which, as I understand it, your Honor has stated can come in only after Mr. Sutro has given his testimony.

The Court: That is correct. But the court has not indicated that it is going to permit the narration by Mr. Sutro of his mental processes, which are not capable of cross-examination. If there are

(Testimony of Adolph G. Sutro.)

exhibits, or if there be writings or memorials, as there is one here before the court—if there be others, they can be produced, and the court can look at them, and your opponent can cross-examine about them.

Mr. Cranston: Yes.

The Court: But Mr. Sutro's own mental processes, however praiseworthy they may have been, and however learned they may have been, are not within the scope of that ruling.

Mr. Cranston: I believe that during the noon recess I can produce and have available at 2:00 o'clock those documents, and I will introduce those first, then, instead of asking certain general questions, if that is agreeable.

The Court: Very well. It is about the hour of recess anyhow. We will take our recess until 2:00 o'clock, gentlemen.

(Whereupon, at 12:00 o'clock noon, a recess was taken to 2:00 o'clock p.m., of the same date.) [784]

Monday, March 1, 1954, 2:00 P.M.

The Court: Proceed, gentlemen.

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the plaintiff herein, resumed the stand and having been previously duly sworn, testified further as follows:

(Testimony of Adolph G. Sutro.)

Direct Examination

(Continued)

Mr. Cranston: Your Honor, I had intended this morning to endeavor to ask Mr. Sutro a few questions rather briefly preparatory to recalling Mr. Tedford, but the objection which Mr. Abbott has raised and your Honor's remarks have made it apparent, I believe, that I should ask your Honor for permission to go into Mr. Sutro's background a little in order to lay a better foundation for these questions.

I think also that we should consider the fundamental purpose of the Tort Claims Act, and exactly the damages to which we are entitled, and also the rules of law relating to the admission of evidence as to intent.

I shall try to be extremely brief on this, but it is an important question for the plaintiff, and I would like the opportunity to present my remarks, as I say, as briefly as possible on that point.

First, the Federal Tort Claims Act provides that the United States shall be liable respecting the provisions of this Title relating to tort claims in the same manner and to [785] the same extent as a private individual, and the measure of damages, as set forth in the California Civil Code, Section 33.33, for the breach of an obligation not arising from contract, the measure of damages except where otherwise expressly provided by this Code is the amount which will compensate for all the detriments proxi-

(Testimony of Adolph G. Sutro.)

mately caused thereby, whether it could have been anticipated or not.

Mr. Abbott: If I may interrupt just a moment. Your Honor, will the defense be given the same opportunity at this time to argue the question relative to damages?

The Court: No, I am not going to listen to much argument because I have been over this twice now in this case.

Mr. Cranston: This is merely the preamble, your Honor.

Mr. Abbott: I have no objection, your Honor, to going into this once again, if we are afforded the same opportunity. We have some serious questions of law relative to the measure of damages which we would like to further discuss.

The Court: I am going to listen to both of you at the conclusion of the evidence, but not interspersing the evidence with argument each time counsel thinks the court has ruled in a way which he does not agree with, and that he thinks he can persuade the court that the court is wrong. Now, maybe you can do that at the conclusion of the evidence.

Mr. Cranston: Well, the only purpose of reading that, your Honor, was to point to this fact, and that is the only [786] law I am going to read on the question of damages; that it is the detriment caused to the individual, that is, the loss to Mr. Sutro, not necessarily to an average man. That is the extent of the legal argument on that point.

Now, we have here, I believe, addressing myself

(Testimony of Adolph G. Sutro.)

now to the admissibility of the evidence, an example again of what was referred to by Mr. Sutro in Exhibit 24 in evidence, in the letter which he had written to me, a copy of which I sent to Mr. Deutz, in which he said that he was—I quote from the exhibit:

“quite willing to do anything I possibly can to mitigate damages,”—this is found in the transcript at page 357—“but this particular situation has me in a quandary. I don’t know what to do, and as I said in the beginning of this letter, anything we do do, the Government will claim is wrong.

“If I install a complete irrigation system for the entire ranch and am then not allowed to use it due to polluted water, the Government will claim we are trying to build up damages. If I do not install it, they will claim I did not try to mitigate damages.”

And now, of course, they are claiming that since he did not install it, that he never at any time intended to [787] install it, and that he will not be permitted even to testify as to what his intention was. Then he says:

“If the pollution is removed but the Government is correct in its contention that it can discharge its sewage any place the spirit moves it * * * I am again not warranted in constructing a complete system. Until their ‘discretionary act’ claim is cleared up in court, I do not think I dare make a move.”

“ * * * The sound, sensible, efficient way to irrigate the ranch is to design at one time and as a unit

(Testimony of Adolph G. Sutro.)

the entire installation. I know of no other way to get an economic, fully integrated and easily maintained plant. But as it is, the Government has me feeling like a rabbit being chased by a dog," and so forth.

" * * * If I do it, the Government will deny liability for expense incurred. If I don't, they will claim I should have."

And now we see an example. They say he should have installed the system.

And then he says he wants to know if we can get an agreement out of the Government not—to cease the flow of the effluent, so that he can try to adopt the expedient of using the land for alfalfa temporarily until it can be used for the [788] celery crops.

Now, a couple of authorities on the question of intention. As I understood the remarks of Mr. Abbott this morning, the objection was raised that if Mr. Sutro testifies as to his intention, there is no feasible way of cross-examining him.

I submit, your Honor, that the authorities are well settled that a witness is permitted to testify to his intention when that intention is a material factor in the case. I have two authorities here to which I will refer if your Honor is in any doubt on that point.

The Court: No, I am not in any doubt on that point. The point I am in doubt on is this: That if all you have is the intention—let's take a simple case, and I think it will illustrate it, a simple tort

(Testimony of Adolph G. Sutro.)

case of a personal injury a man sustains a broken leg, and he thinks that he ought to go to a doctor, and he goes to a doctor, and the doctor doesn't do the work that should be done, that he should have gone to another orthopedic surgeon, and in his lawsuit he says, "I wanted to go to Dr. John Brown, this eminent orthopedist down here, but instead of that I went to Dr. John Smith, but my intention was to go to Dr. Brown, and if I had gone there I am confident my leg would have been repaired, it would not have been in the condition it is now, and therefore, I think that I should be entitled to additional compensation, [789] additional damages, because of the detriment that I have suffered."

I think that is a pretty parallel case. It seems to me that it is completely out of line with any standard which you could adopt.

Now, then, I am talking about the intention, and that is all I am talking about.

Mr. Cranston: Well, we have——

The Court: If there is nothing further in the case than the mere mental concept, the intention of someone to do something, and nothing in furtherance of the execution or the carrying out of that intent——

Mr. Cranston: Well, we do have certain correspondence which indicates the carrying out of that intent, and also, your Honor, I would like, as I have said, permission to go into certain events which occurred even before the purchase of the property, which I believe further substantiate the intention

(Testimony of Adolph G. Sutro.)

and show the background, the general state of mind of Mr. Sutro, and indicate why he was interested in these matters.

What we are trying to establish, as I have indicated, is that a certain irrigation system would have been installed. Now, it was not installed because of the acts of the defendant.

I believe that we are entitled to examine Mr. Sutro as [790] to his correspondence, and as to the background to that correspondence, because without the background the correspondence is not intelligible.

The Court: There was a lot of evidence produced, and it is in the record, voluminous correspondence with officers of the Navy.

Mr. Cranston: Well, this is——

The Court: One very striking letter that I remember was from Assistant Secretary Kimball, which was a very illuminating letter. What I am trying to say is the court is limiting the production of evidence, even on intention, to intention that resulted in something in furtherance of that intention. Otherwise it is just simply taking up time, because the court has already expressed itself now that he had a dual intention in going down and acquiring this property.

How are we going to segregate the intention with respect to the pecuniary aspect, and that is what you are talking about, the money aspect.

Mr. Cranston: Yes, that is what I am talking about.

(Testimony of Adolph G. Sutro.)

The Court: How are you going to separate that in court from the, shall I say, sentimental aspects of the case? Probably it wasn't pure sentiment. It was the desire to provide a suitable home for his mother and himself. He was a bachelor and lived with his mother, apparently. That is the inference that is deductible from the facts. [791]

He went down there. There was a beautiful site near a very beautiful town in his State, and he selected that as a place where his mother and himself could have a home that would be pleasurable and also profitable. But how are you going to separate the pecuniary, the money aspect of it, from the sentimental aspect of it?

Mr. Cranston: Well, I believe, your Honor, if I might be permitted to ask the questions which I intend to that they all relate to the pecuniary angle, not to the sentimental angle, and I think that I can tie them up with the correspondence. But to make the correspondence really effective, I must ask a few preliminary questions as to Mr. Sutro's not sentimental background in any way, but his actual business and economic background.

The Court: Haven't we a good deal of that in the record already?

Mr. Cranston: This is in addition to what is in the record, and a wholly separate line. It will not be repetitious of any testimony in the record.

The Court: As long as you don't go into the record again, the same record that we have. He narrated his experience, and told about the Sutro Baths,

(Testimony of Adolph G. Sutro.)

and the conduct of those, and that he had acquired the knowledge of analyzing water, and you introduced evidence as to the correspondence with the naval people, introduced the Deutz letter [792] asking the Department of Justice for some kind of a settlement. All of that is in the court's mind.

Mr. Cranston: But this is wholly separate from that.

The Court: All right. Let's see what it is.

Mr. Abbott: May I be heard briefly on this point which counsel has been discussing, your Honor?

The Government suggests here that we are interjecting a personal element that is entirely foreign to the law of measuring damages for the destruction or diminution of value of real or personal property.

The only question which the court is now trying, as the Government views it, is the question of how has the fee value or the annual rental value of this property been reduced by reason of the tortious conduct of the defendant, as found in the earlier trial. Can it be said that if Mr. Sutro owned the land at the time of the damage that the amount of recovery should be one figure, but that if Mr. Ikemi or Mr. Brown owned it the recovery should be another? I think that that is something entirely foreign to the law of damages. All we are considering now is the diminution in annual rental value which actually comprehends all of these collateral things we talk about.

If there was a good reason why these structures

(Testimony of Adolph G. Sutro.)

could not have been erected, and I question that there was, but if such a reason existed, then that will be reflected in the [793] diminution of the annual rental value, because the tenant would know there was a certain limitation on what he could use and what he could build.

But to say that if Mr. Sutro comprehended a certain use, and if someone else did not, that there must be a difference in the measure of damages suffered is something which is wholly unprecedented, nor does counsel cite any authorities in support of it.

The Court: I will hear some, and see how far it leads. I am not going to permit too much latitude on it.

Mr. Abbott: Then in order to save time, may it be understood, your Honor, that we are objecting to all of the evidence relative to the plaintiff's state of mind, intention and plans at the time that he purchased the property or shortly thereafter. I don't want to be jumping up.

The Court: It may be understood, and that the court has ruled upon that objection in the same manner that it stated this morning.

Mr. Abbott: Thank you, your Honor.

By Mr. Cranston:

Q. Mr. Sutro, when were you born?

A. I am told I was born October 25, 1891.

Q. Are you an engineer? A. No.

Q. Have you had mechanical experience? [794]

(Testimony of Adolph G. Sutro.)

A. Yes.

Q. Did you design a rowboat? A. Yes.

Q. How old were you? A. Eleven.

Q. Did you take a contract to assemble tilting containers for drinking water containers?

A. Yes.

Q. How old were you then? A. About 15.

Q. Have you built a motorboat? A. Yes.

Q. How old were you then? A. About 16.

Q. Have you run a construction locomotive on a railroad? A. Yes.

Q. Had you had previous experience in operating the locomotive? A. No.

Q. Where did you obtain your experience in operation?

A. I went to the Chicago Public Library and studied up on steam engines and boilers for about three days, from the time the library opened until it closed at night. Then I went down to the Illinois Central freight yard and was [795] able to sell an engineer on a switch engine the idea of letting me ride around with him for about one-half a day, which he did, and I picked up enough knowledge to get by on the construction locomotive job.

Q. Were you ever employed by the Wright Brothers of airplane fame? A. Yes.

Q. In what connection?

A. I was employed in the Wright Brothers factory in Dayton, Ohio, in the wing covering department.

(Testimony of Adolph G. Sutro.)

Q. Did you do other work for them?

A. Yes. I became a road mechanic.

Q. And how old were you at that time?

A. In the neighborhood of 18. It is quite a few years ago.

Q. Did you ever engage in airplane racing?

A. Well, yes. On the first transcontinental airplane racing, which took place around in 1910 or 1911, I was master mechanic.

Q. Did you ever design an airplane?

A. I did.

Q. Was the plane built? A. Yes.

Q. Who built it? A. I did. [796]

Q. Personally? A. Yes.

Q. Was this design approved by professional airplane designers? A. No.

Q. What were their objections?

A. The principal objections were that the plane would never leave the ground. If it did, it would fall to pieces in the air. I thought any other objections were redundant.

Q. Did you proceed to build the plane?

A. Yes.

Q. What happened?

A. I had—I was very young—I thought I might build a better plane than had ever been built before. I—shall I stop for a minute, your Honor, until he returns?

I thought I might build a better plane than had ever been built before, and that the best way to

(Testimony of Adolph G. Sutro.)

prove it would be to see if I could break some of the existing records.

Q. Did you make any stress analyses at that time?

A. Yes. I believe it was the first stress analysis ever made on an airplane.

Q. Did this plane perform as you had expected?

A. Yes.

Q. What did it do?

A. It made practically a clean sweep of every record [797] in its class.

Q. Can that be verified from any source?

A. Yes, in the National Museum of the United States. It is in their archives.

Q. And have you personally seen the archives?

A. I have seen the archives of the Smithsonian Institution.

Q. Did the United States Navy ever use planes which incorporated some of the features of your design?

A. Yes.

Q. What features?

A. A method of allowing a seaplane to leave the water more rapidly than current designs.

Q. Who flew this airplane when the world's records were broken?

A. I did.

Q. Who holds License No. 1 for land planes in the United States.

A. I believe, if my memory is correct, it is held by Glenn Curtiss.

Q. I show you a document, and ask you if this was issued to you.

A. It was.

(Testimony of Adolph G. Sutro.)

Q. And what is that?

A. That is the first seaplane license issued. [798]

(Counsel referring to another document.)

A. Oh, that is just an annual certificate.

Q. Did you give up flying afterwards?

A. I did.

Q. Why?

A. The income was not commensurate with the hazard.

Q. You were in the aviation business for what purpose?

A. For the purpose of making a profit.

Q. What did you do then? What business did you enter during the 1920's?

A. I was in the construction business.

The Court: Just a minute, please. I did not get that.

The Witness: I was in the construction business.

Q. Did you build a house trailer? A. Yes.

Q. Had other house trailers then been built?

A. Not to my knowledge.

Q. Was that a commercial venture?

A. No.

Q. Did you thereafter design and supervise the construction of a swimming plunge, a co-efficient system? A. I did.

Q. Did that differ from previously accepted principles of construction? A. It did. [799]

Q. And was it a success?

A. It was, and is in use today.

(Testimony of Adolph G. Sutro.)

Q. Did you personally design the instruments to govern the operation of this filter?

A. I did.

Q. Did you personally design the chlorinator in this system? A. I did.

Q. Is it in use now? A. It is.

Q. Did you design a commercial ice skating rink?

A. Yes, with the exception of the installation of the refrigeration machinery. I have had no experience in refrigeration.

Q. Did you do certain work in 1933 before the United States Navy or in connection with work with the United States Navy dealing with stuffing boxes or glands?

A. That was in 1943, during the war, and—may I ask you to repeat your question?

Q. Did you do any work in connection with the United States Navy or aroused by the United States Navy in connection with stuffing boxes or glands? A. Yes.

Q. What was that work?

A. I was told by some friends, who had some connection [800] with a war contract, that the Navy was having some trouble in operating the controls on instruments which were submerged to a considerable depth; that if they made the glands or stuffing boxes on the shaft tight enough to prevent leakage, they had difficulty in turning the shaft, while if they loosened the glands, they then had

(Testimony of Adolph G. Sutro.)

difficulty with leakage entering the instrument and ruining it.

Q. What did you do?

A. I was able to suggest a device which, for all practical purposes, was absolutely water-tight and absolutely frictionless.

Q. Where did you produce this device?

A. I made a model in my shop at home.

Q. Was this ever used by the Government?

A. It was used on some instruments owned by the United States Navy.

Q. Did you build a trailer to haul supplies to your ranch when you should purchase one?

A. I did.

Q. When was this?

A. Prior to 1945. I would estimate around '43 or '44.

The Court: I would like to have the last two questions read.

(The questions and answers referred to were read.)

The Court: I want to ask you a question there so as to [801] save the court's time properly. Did you at that time have in mind the purchase of this property that is in question here?

The Witness: No, your Honor. I had in mind at that time the purchase of a ranch.

The Court: No, I asked you a specific question.

The Witness: Yes. Not the specific piece.

Q. (By Mr. Cranston): Were there any special

(Testimony of Adolph G. Sutro.)

problems in connection with the braking power of this trailer?

A. Yes. I wished to haul it behind a passenger car at comparatively high speed without having to put brake operating equipment on the passenger car, because I did not know which particular car would be used as a tow car.

Q. What did you do?

A. I developed an automatic brake, which the momentum of the trailer behind the car applies on the trailer wheels when the car ahead is slowed down.

Q. Did that work successfully? A. It did.

Q. Is the trailer still in use?

A. The trailer is falling to pieces in a cow pasture of the neighboring dairy. I have no place to store it.

Q. About the time, in 1946, after your purchase of the property, did you design a mechanism in connection with the irrigation of fields?

A. Yes. [802]

Q. Can you describe this mechanism?

A. This was an automatic valve designed to go on the irrigation system on the ranch. The feature of the valve was that when an irrigation check had been irrigated, the valve would shut off automatically, and open the next valve on the line, and that this process could have been kept up until the entire field would be irrigated, without any human attention.

Q. Did you manufacture any of these valves?

(Testimony of Adolph G. Sutro.)

A. Yes. A pair of them were manufactured for test purposes, with the intention of taking them down to the ranch and trying them out.

Mr. Abbott: I will object to that, your Honor, or, rather, move to strike the answer which last came in, which I believe is inconsistent with the Court's ruling made, namely, that it reflects the subjective intention of the witness not manifested by any documents or other——

The Witness: There is nothing subjective about that.

The Court: Mr. Sutro, you let the lawyers do the arguing. They are very well prepared to argue the case.

The Witness: I apologize, your Honor.

The Court: What was done with this instrumentality? Was anything done with it effectually at all?

The Witness: No, we put it in storage until such time as we could get the pipelines in. That is why we made it, to use it. We were unable—— [803]

The Court: But you never did use it, or attempt to use it?

The Witness: We had no pipelines.

The Court: Will you answer my question?

The Witness: No, your Honor.

The Court: The objection will be overruled.

Q. (By Mr. Cranston): Mr. Sutro, returning to the period before you bought the ranch, did you design and build a water softener to take care of laundry and boiler equipment? A. I did.

(Testimony of Adolph G. Sutro.)

Q. What did you use as a regenerating agent?

A. Salt water from the ocean.

Q. Was that in accordance with accepted practice?
A. No. I was told it could not be done.

Q. Did it work? A. It did.

Q. Is it accepted practice at the present time?

A. I understand that it is.

Mr. Cranston: Bearing in mind your Honor's ruling with reference to testimony with respect to the Sutro Baths, I have two questions which do not duplicate anything already in the record on that.

The Court: Very well. Propound them.

Q. (By Mr. Cranston): You did own the Sutro Baths and the ice rink at one time? [804]

A. Yes.

Q. During any period of time did you personally maintain and repair all the precision instruments in those baths?

A. From a few—oh, I would say from about a year after the outbreak of World War II until I sold the property, I personally maintained the meters and regulating devices and similar types of instruments.

Q. And did you maintain, personally maintain the heavy machinery during any part of this period?

A. Yes, during a part of the period. Mechanics were few and far between, and mechanics familiar with heavy machinery were practically non-existent, so on some of that, particularly during periods

(Testimony of Adolph G. Sutro.)

when we had a breakdown, I personally maintained the machinery.

Q. Now, Mr. Sutro, at the time you bought the Brown property, was any part of it covered by any type of irrigation system? A. Yes.

Q. Can you describe in general the system that was then on the property?

A. Yes. Mr. Ikemi—you asked me about Mr. Brown. Excuse me. Mr. Brown, I have been told, had taken Ikemi's gas engine driven pump, and had had a 25 horsepower motor mounted on it. Otherwise I understood the system was the same as had been used by Ikemi. [805]

Briefly, it consisted of 10-inch and 8-inch steel pipe, running from the pump to the mesa and the small mesa reservoir. From there a concrete line went part-way up the mesa. Coming back to the pump there was a by-pass whereby instead of pumping up to the mesa, he could pump in a pipeline down to a valve, or valves, in several of the lower fields.

Then, of course—you asked me about the system which was in effect when I purchased the ranch?

Q. That was the last question.

A. That is all.

Q. Did you believe that—did you intend to maintain this system? A. No.

Mr. Abbott: Objection. May the answer be stricken for the purpose of the objection?

The Court: Yes, for the purpose of the objection.

(Testimony of Adolph G. Sutro.)

Mr. Abbott: Your Honor, I don't want to be repetitious about this, but this question once again is objectionable, not only for the reasons stated in our argument, which the court has ruled against, but also objectionable in view of the court's own ruling with respect to subjective evidence on intention. For both of those reasons we object to it.

Mr. Cranston: If the Court please, I wish now to proceed to some letters to show what he did about it. I think I must lay some foundation for [806] that.

The Court: Oh, well, overruled. Let's get right to the substantial part of the evidence.

Mr. Cranston: Yes.

Q. (By Mr. Cranston): Did you write any letters to any pump companies in connection with pumps?

A. Yes. Immediately upon purchase of the ranch, or, rather, immediately upon payment of the deposit on the ranch and before the deed was on record, I wrote regarding the Peerless pump which was in the well, to its manufacturer, to find out about the output of the pump.

Q. On what day did you write to the Peerless Pump? A. December 12, 1945.

Mr. Cranston: Mr. Abbott, would you like to see the document?

Mr. Abbott: Why, yes, so long as he is testifying from the document, I would like to see it.

(The document was handed to counsel.)

Mr. Cranston: If the Court please, I will offer

(Testimony of Adolph G. Sutro.)

in evidence this letter, which the witness has testified was a copy of a letter sent by him to the Food Machinery Company as our next exhibit in order, the letter of December 12, 1945.

Mr. Abbott: It is objected to upon the following grounds: first, as hearsay, and not subject to any exception, and without any proper foundation. Secondly, the letter does not do what counsel states that it will do. It does not establish [807] any intention about any purchase of any equipment. It is a letter inquiring as to the characteristics of a pump on the property at the time it was purchased.

Mr. Cranston: May I then, your Honor, inquire of the witness as to the intention with which the letter was written?

Mr. Abbott: Hold your answer, please. We object to any such question, your Honor. When they take a meaningless letter, or letter which has no bearing on the point under consideration, and introduce oral evidence to attempt to establish an intention consistent with plaintiff's contention, they do no more than when they introduce oral evidence unassisted by any document. There is nothing here to bear out the statement.

The Court: Perhaps I had better look at the proffer.

(The document was handed to the Court.)

The Court: Now, what is before the Court, Mrs. Zellner?

(The record was read.)

(Testimony of Adolph G. Sutro.)

The Court: Let it be received and marked filed as the next exhibit.

The Clerk: That will be Plaintiff's Exhibit 35 into evidence.

(The document referred to was marked Plaintiff's Exhibit No. 35 and was received in evidence.)

Q. (By Mr. Cranston): Did you receive a reply to this letter, Mr. Sutro? [808]

A. Yes, Mr. Cranston.

Q. Do you have it before you?

A. Yes, Mr. Cranston. This is the letter. (Handing document to counsel.)

Mr. Cranston: I will offer that as our next exhibit, your Honor.

Mr. Abbott: To which the defendant objects on the ground that the letter is hearsay, not within any exception to the hearsay rule, and that no foundation for it has been layed. On the further ground that the evidence has no bearing on the particular matter under discussion, and purports to furnish information relative to an existing pump on the property. I fail to see its materiality.

The Court: If you are going to read the letter, you read the letter. If you are going to let the Court read it, you had better let the Court read it, instead of stating what it is.

(The document was handed to the Court.)

The Court: About all the letter says is that they

(Testimony of Adolph G. Sutro.)

cannot give him the information, and refer it to the Los Angeles office. Isn't that it?

Mr. Cranston: That is what the letter says. The purpose is to indicate Mr. Sutro was endeavoring to design a system at this time. In addition to his present testimony this indicates actual activity on his part in that connection, [809] which is what counsel for the Government seems to desire.

The Court: The letter will be received and filed.

The Clerk: That will be Plaintiff's Exhibit 36 in evidence.

(The letter referred to was marked Plaintiff's Exhibit No. 36 and received in evidence.)

The Court: Why don't you show him all of the correspondence, and identify it, and then if you are going to offer it, offer it all, instead of doing it piecemeal.

Mr. Cranston: Very well, your Honor.

Q. (By Mr. Cranston): I will show you another letter from you, a copy of a letter, that is, from you to the Food Machinery Corporation, dated January 26, and ask you if that is a copy of a letter which you sent to the Food Machinery Corporation.

A. Yes.

Q. I show you a copy of a letter from you directed to General Joseph Fegan, Carlsbad Hotel, Carlsbad, California, and ask you if that is a copy of the letter which you sent to General Fegan.

Mr. Abbott: Before the witness answers, I would

(Testimony of Adolph G. Sutro.)

like an opportunity to inspect that particular letter, which I haven't seen.

Mr. Cranston: Yes. [810]

The Court: You might show counsel all of these letters, so that he can read them.

Mr. Cranston: Yes.

Mr. Abbott: If these were made available during the recess, we might be able to speed up the trial.

(The documents referred to were handed to counsel.)

Q. (By Mr. Cranston): Returning to this letter of February 4th, will you state who General Joseph Fegan was?

A. General Joseph Fegan until a few days before had been the commanding general at Camp Pendleton, California.

Q. In this letter, Mr. Sutro, did you state:

"Between trying to design a new home, a barn, an implement shed, a house for the help, a storage shed, figure out the piping for the irrigation system, the layout of the fields, the type of crops to grow, and a few other things as well as trying to lick the problem of construction mechanics and building materials, I have been, to put it mildly, not exactly idle since my return"?

Mr. Abbott: Objection. The letter is the best evidence of its contents, if introduced.

The Court: Sustained.

Q. (By Mr. Cranston): I will show you the letter dated March 28, 1946, from you directed to

(Testimony of Adolph G. Sutro.)

“Dear Wheaton.” Will you state who Mr. Wheaton was? [811]

A. That is Colonel Wheaton A. Brewer, who is advertising director of the Pacific Rural Press, which is the name of the magazine or was at that time. It is now known as the California Farmer.

Q. And I show you what purports to be a copy of a letter from you directed to “My Dear Professor,” with certain writing in pencil at the top. Can you state to whom this letter was directed?

A. That was sent to Professor Frederick Griffin, dean of the farm university students at the University of California at Davis.

Q. And I show you what purports to be an original letter addressed to yourself from Mr. Pierce Coobms, dated November 13, 1946. Was there enclosed with this last named letter a copy of the rules and regulations referred to in the letter?

A. Yes.

Mr. Cranston: If the court please, at this time I would offer in evidence the letters which have been referred to by the witness.

In connection with the letter of February 4th, I believe the first paragraph is the only part which is material. I would suggest that only that portion be introduced, although if counsel wishes the rest of it, I have no objection.

In connection with the letter of March 28th, I believe [812] only the first two paragraphs are material.

In connection with the letter of September 22nd,

(Testimony of Adolph G. Sutro.)

I believe that only the first three paragraphs on the second page have any materiality.

The other letters I would introduce in their entirety.

If Mr. Abbott wishes to have the rest of the other letters introduced, after he has examined them more fully, I would have no objection. My only thought is they would clutter the record.

Mr. Abbott: First, we will object to the entire offer on the ground it is incompetent and immaterial. There has been no occasion shown for measuring damages by the method which counsel suggests. Further, that the evidence is hearsay, that no proper foundation for it has been laid. Furthermore, that it does not come within the scope of the court's ruling in the hearing on September 29, 1953, when the court in discussing the question of damages for increased building costs referred to plans, building contracts, and specifications I believe was the third term used by the court. These documents fall far short of that criterion.

The Court: I haven't seen the documents and, therefore, cannot rule on the objections until I have seen them. I will look at the documents.

Mr. Abbott: With respect to counsel's suggestion, I haven't had an opportunity to examine the letters carefully, [813] but I can see no harm, if they are going in evidence over objection, to have them go in in their entirety rather than sorting out the particular paragraphs.

(The documents were handed to the court.)

(Testimony of Adolph G. Sutro.)

The Court: Are these in chronological order now?

Mr. Cranston: I don't know that they are.

The Court: I don't recall the use of the name Cruikshank of Santa Ana.

The Witness: The owner was a man by the name of Cruikshank, of the Bank of Santa Ana.

The Court: That is the same property?

The Witness: The same property, your Honor, largely. There were additions made later on to it.

Mr. Abbott: When convenient, may I call the court's attention to the particular language in the court's remarks of September 29th? I did not mean to interrupt, but I did want to do that before the court rules.

(The documents referred to were examined by the court.)

The Court: Now, what was the further observation that you wanted to make? That was in the hearing of——

Mr. Abbott: September 29, 1953, your Honor.

The Court: I don't think I have the transcript of that.

Mr. Abbott: I would be happy to make my transcript available to the court.

The Court: You can read the portion there. [814]

Mr. Abbott: I am reading from the top of page 118, the first full sentence beginning there, as follows:

(Testimony of Adolph G. Sutro.)

“I think you would be entitled to show the increase in costs of buildings or appurtenances that he had plans for or had made contracts concerning, or anything of that character.”

I take it that the court's thought there was that if a man has made plans in detail, or has let contracts, that the scope of the work contemplated is prescribed in some detail. Furthermore, that the accuracy of his recollection of his intentions is somewhat enhanced by that detailed preparation.

The documents offered at this time tell us little or nothing. The witness will have to tell us how many pipes, how many pumps, where he is going to put them, how many reservoirs, or their sizes. There is nothing in the documents that would give the Government any leeway for ascertaining the accuracy of the recollection which the witness will now describe to us if counsel's views are accepted.

The Court: The objection is overruled. These will be received and marked filed. Do you want to read them? I don't think it is necessary to read all of those.

Mr. Cranston: No.

The Clerk: What exhibit number, your Honor?

The Court: There is a lot of stuff there that ought to be excluded from the files of this court. It is all in evidence. [815]

The Clerk: One exhibit number, your Honor?

The Court: Yes.

The Clerk: That will be Plaintiff's Exhibit 37 in evidence.

(Testimony of Adolph G. Sutro.)

(The documents referred to were marked Plaintiff's Exhibit No. 37 and received in evidence.)

Q. (By Mr. Cranston): Now, Mr. Sutro, about the time you bought this property, did you discuss with representatives of the Soil Conservation Service the building of a reservoir for the storage of water? A. Yes.

Q. Did you discuss this with Mr. Tedford?

A. I discussed it with Mr. Tedford, and I discussed it with Mr. Bosanko, one of his engineers.

Q. When did you discuss it with Mr. Tedford?

Mr. Abbott: Your Honor, we must again object to this line of questioning. This is still one further step removed from the documents last received in evidence. This is on recollection as to an oral conversation; no indication that there has been any specifications for work or that the work has been described in detail, and even when there are specifications, this would not be competent to establish damages in a suit of this type.

The Court: Overruled. [816]

The Witness: Would you please repeat the question?

Q. (By Mr. Cranston): When did you first discuss the matter with Mr. Tedford?

A. When I first purchased the ranch, I would say the latter part—after I had made the deposit on the ranch, in the latter part of 1945, before it was out of escrow, or the early part of 1946.

The Court: Maybe if we took our recess now,

(Testimony of Adolph G. Sutro.)

gentlemen, you could show this material that you have, that you are going to proffer, to counsel on the other side, and have it all marked, so as to save a lot of the court's time.

Mr. Cranston: Yes, sir.

The Court: We will take a recess for about five or ten minutes.

(Short recess.)

The Court: Proceed, Mr. Cranston.

Mr. Cranston: Your Honor, during the recess we have had marked for identification three documents as Exhibits 38, 39 and 40.

(The documents referred to were marked Plaintiff's Exhibit Nos. 38, 39 and 40 for identification.)

Q. (By Mr. Cranston): Mr. Sutro, I show you a document which has been marked Exhibit 39, for identification, and ask you what the lines upon this document represent?

A. May I ask you which color lines? [817]

Q. The blue lines.

A. The blue lines represent irrigation pipes.

Q. And I show you a document marked Exhibit 38, for identification, and ask you what the blue lines and the brown lines on this map represent.

A. The blue lines also represent irrigation pipe. I should have qualified it by saying they represent concrete irrigation pipe. The brown lines represent a steel pipe.

(Testimony of Adolph G. Sutro.)

Q. Mr. Sutro, at the time you purchased this property, it was being used for the growing of edible vegetables, is that correct, or it had been so used?

A. It had been. Its use had been prohibited a few weeks before.

Q. The growing of edible vegetables is a profitable use to put the land to; is that correct?

Mr. Abbott: I will object to that as leading. I don't want to be overtechnical, but counsel has asked a number of leading questions.

The Court: Before we go any further, the objection is overruled as to this one.

The Witness: To the best of my knowledge, it is its highest and best use.

Mr. Abbott: I will object to that and move to strike the answer. It is not responsive, and, furthermore, the witness has not been qualified to give such an opinion. [818]

The Court: I think that is true. You did not answer the question. You elaborated on it. That portion will be stricken out. Now, if you will answer that question.

The Witness: Will you please repeat the question?

The Court: Read it, please.

(The question referred to was read.)

The Witness: Yes.

Q. (By Mr. Cranston): Do you know, of your own knowledge, of any more profitable use to which you can put it?

(Testimony of Adolph G. Sutro.)

Mr. Abbott: Hold your answer, please. I will object to that, your Honor. The witness has not been qualified to give such an opinion. As a matter of fact, in his life's history, which he has given us in some detail, I hear nothing of agricultural experience.

The Court: I was going to ask that question. Suppose I do that before the Court rules.

Had you ever done any farming, Mr. Sutro?

The Witness: No, your Honor.

The Court: What was your formal education?

A. I attended the University of Santa Clara.

The Court: What did you major in, if you had a major at that time?

The Witness: As I look back on it, your Honor, I think it was Latin.

The Court: You never took any course in engineering, [819] or mechanics in any formal educational institution?

The Witness: I took a three weeks course before I made my stress analysis on my plane. That is the limit of my formal engineering training.

The Court: Will you read the answer?

(The answer was read.)

The Court: The objection will be overruled. Will you read the pending question, please?

(The question referred to was read as follows):

“Q. Do you know, of your own knowledge, of

(Testimony of Adolph G. Sutro.)

any more profitable use to which you can put it?"

The Witness: No.

Q. (By Mr. Cranston): Did you intend to put the land to that use? A. Yes.

Mr. Abbott: Objection, your Honor. The witness' intention is wholly immaterial.

The Court: The same ruling as has been heretofore made. Overruled.

The Witness: Yes.

Q. (By Mr. Cranston): For that purpose is an irrigation system essential? A. Yes.

Q. Are the lines which you have identified as representing irrigation lines, which are shown on these two exhibits, [820] designed to irrigate this property?

Mr. Abbott: Your Honor, we will object to that. Again, the witness has not shown any competence in the field which the question presupposes. I assume that his experience in stress analysis and a three-weeks course in engineering does not qualify him to design agricultural irrigation systems.

The Court: There has not been much foundation laid as to these instruments.

Mr. Cranston: I am intending to get at that through this question, your Honor.

The Court: Why don't you come at it directly instead of beating around the bush?

Mr. Cranston: Very well.

Q. (By Mr. Cranston): Mr. Sutro, were these lines placed upon this map by you or under your

(Testimony of Adolph G. Sutro.)

direction? A. Under my direction.

Q. And when were they placed on there?

A. A few months ago.

The Court: Now, let's fix the date a little more specifically, because the Court has made a certain ruling on that. I think I can ask a question that will elicit the fact that the Court wants to know about.

Was it before or after the conclusion of the trial in San Diego?

The Witness: Oh, it was after the conclusion of the [821] trial in San Diego, your Honor.

Q. (By Mr. Cranston): Mr. Sutro, were these lines placed upon the map in reliance upon your own suggestions, or upon those of other individuals, or was it a combination?

A. They were placed upon the map after consultation with people whom I thought were competent to decide on their location.

Mr. Abbott: I will move to strike as not responsive, your Honor. I think the answer goes far beyond the question.

The Court: Yes, I think it does.

The Witness: Will you repeat the question?

The Court: It will go out. Read the question, please.

(The question was read.)

The Witness: A combination.

Q. (By Mr. Cranston): You consulted with other individuals, then, before these lines were placed on the map? A. Yes.

(Testimony of Adolph G. Sutro.)

Q. Who were these individuals?

A. I talked to one of the farmers who had had a wide experience in irrigated fields.

Mr. Abbott: Your Honor, I think we will have to object to this, in view of the tenor of the answer. This appears to be by indirection a method of introducing the expert opinion of someone who isn't here. I assume that the question, from the partial answer, is that certain persons advised the [822] location of these installations in the manner in which they have been drawn on the drawing. If expert evidence of that type is to be produced, it should be produced in court.

The Court: Of course, this is the owner of the property and the plaintiff in the case. He would have a right to testify as such regardless of his technical qualifications.

Mr. Abbott: As to value, your Honor, but not as to the adaptability of a particular system from a technical or agricultural standpoint.

The Court: I think he has a right to testify as to what he did looking to the ascertainment of the problem that was presented. Overruled.

Mr. Cranston: Had you finished your answer? Will you read the answer?

(The answer was read by the reporter.)

The Witness (Continuing): Regarding the location of the outlets.

The Court: Now, let me get this more defi-

(Testimony of Adolph G. Sutro.)

nately as to the line of evidence by a question to the witness.

These red lines that are delineated upon these exhibits for identification were made by whom?

The Witness: They were put on by my foreman.

The Court: What is his name?

The Witness: Howard Hoots.

The Court: And is he the only person that collaborated [823] with you? You said that it had been done in conjunction with others.

The Witness: No, he did no collaborating. He did not collaborate in any way, except to draw the lines. He is not an expert.

The Court: How'd he happen to draw the lines, if he had nothing to do with it?

The Witness: Because the original lines—these are copies, and he copied the other drawings.

The Court: You say these exhibits for identification are copies of some other documents?

The Witness: No, they are copies of the same document. In other words, my understanding of your question, your Honor, was who drew the lines on this particular map. I told you who did it. Now, that is what I——

The Court: And how did he happen to do it is what I asked.

The Witness: Because I told him to copy another map, so that we would have several copies.

The Court: Where is the other map from which he copied? Do you have it available?

The Witness: Do you——

(Testimony of Adolph G. Sutro.)

Mr. Cranston: No, this is the only one I personally have seen. Did the other have any additional information not shown on this one? [824]

The Witness: No, none whatsoever.

The Court: Do you know, Mr. Sutro, how these documents which have been received for identification—from whence they came?

The Witness: To what documents are you referring?

The Court: I am referring to these maps.

The Witness: Why, yes, your Honor. I was instrumental in having them drawn up.

The Court: And who drew them up?

The Witness: You mean the original ones?

The Court: I am talking about these exhibits, for identification, which we have here in court.

The Witness: This was drawn up by my foreman. He copied another—a similar map. We made several copies; two or three copies, in fact.

The Court: And you had the original—what you call the original map—you had it made?

The Witness: Yes.

The Court: Who made that original?

The Witness: Well, that was a combination of one of the ranchers, some concrete pipe people, and myself; two of the ranchers, in fact.

The Court: And where did they get the data? Was the data available to them from any other record or memorial, written memorial, or map? [825]

The Witness: I gave them—I calculated the

(Testimony of Adolph G. Sutro.)

pump sizes, the output, the location of the reservoirs, and with those—with that design data to start, why, they worked up the distribution system.

The Court: And that was all done subsequent to the decision of the court on the question of liability?

The Witness: That was done subsequent to your ruling as to what would be allowed, which I believe was somewhere around September 20th of last year.

The Court: Well, that was then subsequent not only to the decision of the court on the question of liability,—

The Witness: That is correct.

The Court: —but on the ruling that the court made upon a matter in September?

The Witness: That is correct, your Honor.

Nothing was done until your ruling was made.

The Court: Then you never did anything in furtherance of the installation of an irrigation system there until that time? I am not talking about your intentions now. I am talking about the actual doing of something in furtherance of your intention.

The Witness: I will attempt, your Honor, to answer your question to the best of my ability. If I am not doing so, it will not be due to any lack of effort on my part.

I drew up numerous plans. My notes are sketchy. I [826] spent several days attempting to be in a position to come into court and show you sheets of

(Testimony of Adolph G. Sutro.)

paper with all the design data, the calculations and the finished job. I couldn't find them anywhere.

I then spent three days attempting to reconstruct from the fragmentary notes I had. The only thing I can say, your Honor, it was like trying to reconstruct a steak from a handful of hamburger. I could not do it.

The only solution that seemed fair and reasonable was then to produce the minimum plan which would give a satisfactory irrigation system and use that as a basis. There is no representation in the slightest that this plan was made in 1946.

The Court: And there is no evidence to this moment that it was made at any time until after a ruling of the court in September of last year?

The Witness: Oh, I have definitely stated it was made after your ruling. I said it was not commenced until you had ruled. At least, that was my intention.

The Court: Yes, but there were some fragmentary data.

The Witness: Yes. Every time—may I ask my counsel? Well, I had better not.

The Court: No.

The Witness: Excuse me, your Honor.

The Court: I am trying to get at the basis of these [827] exhibits.

The Witness: What did we do? I would have the pump salesman come out to my place. I would give them the specifications for the pumps. A few

(Testimony of Adolph G. Sutro.)

weeks later the Navy would change their plans. We would re-draw the plans or the data, maybe, without rehashing the case. The first plan was a diversion works in the creek bottom.

The Court: That has all been put in the record.

The Witness: No. The irrigation plans.

The Court: No. Your irrigation plans——

The Witness: Are not in the record.

The Court: Your diversion plans.

The Witness: That was the first method. The next one was, I had been in the real estate office of the Eleventh Naval District, and they had shown me the plans of the proposed improvements. I took the liberty of suggesting that if they would put a valve at the bottom of the dam, it would simplify the acquisition of the water. That changed all our design data.

Then we went back to the diversion works, but did not dare install it, because we had given the Navy a right-of-way, and if we put the diversion works in the creek, they would only have had to remove them.

Then—there are innumerable instances in between where—what I would say is this: I finally reached the [828] stage where I was ashamed to have the pump salesman come out.

Then the Halliday plan came, and the information I had in regard to its probable fulfillment was such that we once again sent to the pump companies for pumps based on certain design data. I have those letters, if I may be permitted, your Honor.

(Testimony of Adolph G. Sutro.)

The Court: I think I now understand how these instruments were prepared, and you can go forward with your questions.

Q. By Mr. Cranston: Then, Mr. Sutro, this system was actually designed in its present form in the fall of 1953? A. Yes.

Q. Is it a system which you intend at the present time to place upon the property or do you intend to make further changes in the system?

A. No.

Mr. Abbott: I will object, your Honor. I don't think the witness' intention is material in this instance.

The Court: Overruled.

The Witness: If I can think of a more economical way, I will be only too happy to be open to so install it, and if the Government wishes to suggest any more economical way, I would be only too happy to listen to their suggestions.

Q. By Mr. Cranston: Well, if you received no such suggestions, what course of conduct will you follow? [829]

A. It can go in as designed.

Q. Now, Mr. Sutro, the lines to which we have referred in the past testimony have been the blue lines and the brown lines. Now, there are on this map or chart, in addition,—on Exhibit 38 there is a red rectangle near one corner with the words "road reservoir," and there is a red line near the word "dam," and there is another red rectangle with the words "mesa reservoir." What is indi-

(Testimony of Adolph G. Sutro.)

cated by those lines, and when were those lines placed upon the map? Or I should ask separately as to each. A. Yes.

Q. As to each installation. As to the road reservoir?

A. The road reservoir,—as I understood your question, you asked when were the lines placed on the map?

Q. Yes.

A. The lines were all placed on the map at the same time.

Q. That is, the red lines were placed on at the same time as the brown lines and the blue lines?

A. Yes.

Q. Now, you testified at the prior hearing to the digging of an additional well in the year 1950.

A. Yes.

Q. After that well was dug, did you make any changes in your plans for the irrigation of the property? That is, [830] in answer to the court's questions, you have testified to various changes of the plans.

A. Yes. That proved to us that we could irrigate the balance of the land. In the past we had only figured on irrigating the land which had been irrigated before.

Q. And what is the purpose of this rectangle marked "road reservoir"?

A. That is what is known as a day reservoir. It permits of lower pumping costs by running your pump 24 hours a day and getting into lower

(Testimony of Adolph G. Sutro.)

service charges by the use of a smaller motor, and lower current charges by being able to get in the lower brackets.

Q. Now, what is the significance of the mesa reservoir?

A. That was designed for the same purpose. It also—in this particular instance, well, in all instances, it allows the use of a smaller and more economical pump. In other words, if I recall it, the mesa reservoir is designed to be filled by a pump at the rate of 200 gallons a minute. That would be too small a stream for an irrigator to handle economically. So the purpose of the reservoir, among others, is to permit of large volumes to come up at one time.

As an illustration, the dam, while being pumped or filled with a comparatively small pump, is designed to permit of the discharge of the water at the rate of between five and six [831] thousand gallons a minute.

Q. And yet it will permit the water to be taken out of the dam in a flow considerably larger?

A. Five or six thousand were my calculations as to the maximum reasonable capacity.

Q. Pardon me. I believe I probably missed the last part of your answer. A. Excuse me.

Q. Now, I show you, Mr. Sutro, a document which has been marked Exhibit 40, for identification, consisting of two yellow sheets of paper, and ask you what that represents, and when it was prepared, and by whom.

(Testimony of Adolph G. Sutro.)

A. That was prepared by Mr. James Bosanko, an engineer of the United States Soil Conservation Service on September 23, 1949. That was just about some months after the Halliday report. It shows the cubic yards of various sections of this dam.

Q. There are figures at the top of the page, and then totaled up, with the words "17.08 ac.ft." What does that represent?

A. That represents the acre-feet capacity of the dam before allowance is made for the amount of fill excavated behind the dam. In other words, the dam would be, according to the Soil Conservation Service——

Mr. Abbott: Your Honor, I haven't objected to these [832] questions, which I had assumed were intended to lay the foundation for introducing these various documents. However, the witness of late has actually been testifying to their contents, and to the extent that he is so testifying, I will object to that as being hearsay, as being immaterial, as lacking any proper foundation.

Mr. Cranston: If the court please, I believe that the witness can testify to what is represented by these figures, and to the method which would be followed in constructing the dam.

The Court: Are you willing to concede the admissibility of these as exhibits in the case, Mr. Abbott?

Mr. Abbott: I certainly am not, your Honor, but I was going to permit counsel a full oppor-

(Testimony of Adolph G. Sutro.)

tunity to identify them, and their mode of operation. However, the present mode of inquiry goes beyond that and constitutes an inquiry into their contents.

The Court: Overruled.

Mr. Cranston: You may answer.

Will you repeat the question? Will you read it, please?

(The question and answer referred to were read.)

The Witness (Continuing): Of a capacity approximating 20 acre-feet.

Q. (By Mr. Cranston): You would add to the capacity prior to the excavation the amount of dirt which was removed [833] in creating the dam, and that would be added to the capacity of the dam?

A. That is partially the case.

Q. What would be the rest of the truth?

A. That the dirt removed from behind the dam to construct the dam, a certain portion of it is on the upstream face of the dam, so that if you make an excavation of five acre-feet, you don't gain a net of five acre-feet in capacity.

Q. You gain only a part of the net?

A. You only gain a part of it.

Q. Now, referring finally to the last lines which have not been identified on Plaintiff's Exhibit 39, for identification, there are certain red lines on this map. What do they indicate?

A. They represent the drainage system in an

(Testimony of Adolph G. Sutro.)

effort to reclaim land which has been damaged by alkali.

Q. And they were placed upon the map at the same time as the other lines to which you have testified?

A. Yes, with the exception of this yellow line, which indicates the amount of land—the acreage of the amount of land affected by alkali, as agreed upon by the Government appraiser and myself.

Mr. Abbott: I will move to strike that answer as not responsive.

The Court: No, it isn't. [834]

The Witness: All right. The only line not put on originally was the yellow line.

Q. (By Mr. Cranston): Now, when was the yellow line put on?

A. (Referring to notebook): Mr. Cotton came out December 15th. I think the yellow line was put on as soon as I could take the drawing to the Soil Conservation to have the acreage calculated. I would say within a week of December 15th.

Q. 1953? A. 1953.

Mr. Cranston: At this time, then, your Honor, we will offer in evidence these three documents, 38, 39, and 40.

Mr. Abbott: The Government makes the following objection, your Honor: first, that the documents are neither material nor relevant to this cause of action; that they do not tend to sustain any properly measurable recovery under the au-

(Testimony of Adolph G. Sutro.)

thorities of the State of California. Further, that they constitute hearsay, and that no foundation has been laid. Further, that the documents which consist of the maps are not the originals, and that the originals have not been accounted for. On the further grounds that this offer is inconsistent with the court's ruling of September 29th, in that the plans, by the witness' testimony, were prepared in toto subsequent to the date of that hearing. For all of [835] those reasons we believe that both documents are inadmissible.

The Court: Overruled. On this last document, Mr. Sutro, were those lines delineated there by the same man, the foreman? I mean the original drawings?

The Witness: No. He acted as a copyist. The first plans, due to being scrubbed out, and rubbed out, and so forth, I thought were too dirty to introduce in court, and I asked him to draw up a couple of copies.

The Clerk: These are admitted, your Honor?

The Court: Yes.

The Court: Plaintiff's Exhibits 38, 39 and 40 admitted in evidence.

(The documents referred to were marked Plaintiff's Exhibits Nos. 38, 39 and 40 and received in evidence.)

Q. (By Mr. Cranston): Mr. Sutro, in connection with the lines which are indicated in red on Plaintiff's Exhibit 39, which you have testified

(Testimony of Adolph G. Sutro.)

were drainage ditches, at the time you purchased the property a certain portion of it had already been rendered alkaline; is that correct?

A. That is correct.

Mr. Abbott: Object, and I move to strike that part of the answer that came in while the objection was being made.

The Court: Yes.

Mr. Abbott: I object, first, on the ground the question is leading, and, second, it once again moves into the sphere [836] which is outside the scope of the damages ruled upon by the court in its rulings on September 29th. It appears to be an effort to apply to the area which allegedly was caused to be alkaline by the increase in the water table on this plaintiff's land.

Mr. Cranston: Your Honor, that was not the purpose of it. I was inquiring whether a part of it had been as a preliminary to subsequent questions not related to that area; I mean, not related to the extent of the area, or to damages for rendering that part alkaline, but related to the cost of reclaiming it—or, pardon me—related to the increase in the cost of the installations necessary to reclaim it.

The Court: Objection overruled.

Mr. Cranston: You may answer the question. Will you read it?

The Witness: Would you be so kind as to repeat the question?

(The question was read.)

(Testimony of Adolph G. Sutro.)

The Witness: That is correct; and if I testified——

The Court: Well, you have answered the question.

The Witness: That is correct, yes.

Q. By Mr. Cranston: Did you at the time you purchased intend to drain that land?

Mr. Abbott: Objected to as being leading, and on the further ground it is wholly [837] immaterial.

The Court: That is the same thing that has been discussed before. Overruled. The court has indicated its mind, however.

The Witness: Yes. The land would have been of minor value unless drained.

Q. (By Mr. Cranston): Do you intend——

The Court: May I just ask a question there? Maybe I can shorten the inquiry on this question of intent.

Why didn't you undertake that, then, before the court decided the question, so as to prepare?

The Witness: Are you asking me?

The Court: Yes, I am asking you.

The Witness: Why didn't I undertake what? Excuse me.

The Court: Why didn't you undertake the preparation or delineation in the form in which it now appears graphically, so as to ascertain what items or elements of damage to assert with respect to the matters which you have testified to?

The Witness: Let me see if I understand that.

(Testimony of Adolph G. Sutro.)

The Court: Well, there was no use——

You wanted to get the decision of the court on something before you would prepare the case for trial?

The Witness: No, your Honor. My understanding—now, I am not an attorney—is that the hearing on September 20, 1953, was for the purpose of your deciding what evidence would be admissible at this hearing. [838]

The Court: That is correct.

The Witness: And after you decided what evidence would be admissible, other losses which I had were not brought up to date.

Mr. Cranston: I believe, Mr. Sutro, you probably misunderstood the court's question, or possibly I have. I believe the court had in mind why did you not prepare a plan in 1946, when you bought the property, for the drainage of the property. Why did you not put those lines on a map in 1946. I believe that was what the court meant. I may be in error.

The Witness: Was that your question?

The Court: Never mind what the court meant. Go ahead.

Q. (By Mr. Cranston): Will you go ahead and answer my question? I am assuming——

A. Why, I might answer that by saying that this irrigation system is so simple, we did put it on paper. We put it on paper regularly, frequently. It never seemed necessary to draw it out on a map. After all, the calculations in regard to

(Testimony of Adolph G. Sutro.)

pipe friction, pump activity, lift, capacity of dams and things, are not too involved.

We would make the calculations, send the inquiries to the pump people, and then pray that the Navy would go through with whatever was their current plan. Then when that was changed, we would do that all over again. They were [839] merely work sheets. The actual delineations of these pipelines, your Honor, is really nothing.

I might say that having had a moderate degree of success in organizing construction crews. We built that entire ice rink, with the exception of the piping layout of my refrigeration engineer, and the only plans we had were stuff drawn on the back of a couple of envelopes, and you could build several irrigation systems for the cost of that project.

The Court: Proceed.

Q. (By Mr. Cranston): Then whatever plans you had prepared prior to the hearing in September of last year were informal plans. Can you locate those plans at the present time?

A. I said I had spent three days attempting to rebuild from my notes what those plans were, and I ran into the same problem as trying to reconstruct a steak from a pound of hamburger. I could not do it. So that the only recourse I had was to design, with help, the most economical system of putting the ranch under irrigation.

Q. And is the same remark true as to the system for drainage? A. Yes.

(Testimony of Adolph G. Sutro.)

Q. Is this drainage system, as set forth on the map, one which you intend to install, or do you intend to put in a different system? [840]

A. I intended to install that.

The Court: The same conditions were present, weren't they, Mr. Sutro, at the time the Government, the Navy, arranged for the diversion of the effluent, so that it went out over and down into the Santa Margarita River?

The Witness: The same conditions were in existence at the time—up to the time, your Honor?

The Court: At that time. When there was no longer any real—not prospective, or contingent or suppositious—idea that the Navy was going to again dump this effluent into Pilgrim Creek, the same conditions with respect to what is delineated on these maps that are now in evidence existed so as to enable you to arrive at the cost of installing the irrigation system?

The Witness: That is correct, your Honor. Those maps could have been drawn just as well when the pump-over started, but we were threatened—as you may recall, Mr. McCall twice——

The Court: Yes, threatened by the lawyer, but you weren't threatened by the Navy. You were threatened by the lawyer in his argument.

The Witness: I am unable to distinguish between the various branches of the government who were able to threaten me.

The Court: That is the reason that you did not do any of [841] this work until after the court

(Testimony of Adolph G. Sutro.)

had decided the question.

The Witness: That is the——

The Court: If you don't understand these questions, now, tell me that you don't understand, and I will clarify them.

The Witness: I am getting a little bit hazy on that one. Will you repeat it, your Honor?

The Court: Well, let's start at the beginning again. You are now laying a foundation, aren't you, to show me damages for the cost of the construction of these instrumentalities which are delineated on these maps, or which are pictorialized in a way?

The Witness: Yes.

The Court: All of those elements were known to you at the time that the diversion of the effluent ceased to go into Pilgrim Creek and contaminate your property?

The Witness: The answer to that is yes, your Honor.

The Court: But you did not do anything until after the court had ruled in September of last year?

The Witness: Yes, your Honor.

The Court: You don't know whether there was any difference in the cost of construction of these improvements or the entire irrigation system between the time that the Navy ceased to dump the effluent into Pilgrim Creek and the period in September of last year? [842]

The Witness: There was a——

The Court: Do you?

(Testimony of Adolph G. Sutro.)

The Witness: Yes, I do know there was a slight increase. I did not feel safe in starting any improvements until after your Honor's ruling, which I believe was made on July 23, 1953.

The Court: That was the decision on the question——

The Witness: That was your decision. That was the first time I thought a prudent man would feel safe in going ahead and investing the tens of thousands of dollars in an irrigation system, and we are not claiming any increase in cost on that irrigation system past the day of your decision.

The Court: But you are claiming an additional amount over and above the amount that would be required at the time that the nuisance—if I call it that for lack of a better term—ceased to exist?

The Witness: Yes, your Honor, because I did not think any prudent man would have been justified in expending that amount of money.

The Court: I assume that to be your reason, but you say you did not do anything.

The Witness: I did not do anything.

The Court: Proceed.

Q. (By Mr. Cranston): Now, Mr. Sutro, the documents which have been introduced in evidence set forth an irrigation [843] system which provides for irrigating various fields. Have you computed the power cost for pumping the water and to irrigate the land through that system?

The Witness: Yes.

Mr. Abbott: Objection, your Honor. In addi-

(Testimony of Adolph G. Sutro.)

tion to the objections on this subject previously made relative to the materiality of all cost estimates, and bearing in mind the court's ruling, I fail to see the materiality, in particular, of the evidence relative to power costs.

Mr. Cranston: But the power costs, your Honor, would indicate the cost of supplying water to the field, which would affect its rental value. The more expensive the water on a particular area, the less valuable the land.

The Court: I assume you will be able to show that there was a variance between the two dates, or the several dates.

Mr. Cranston: Well, no, there is no variance contended for, particularly, in regard to power costs, but the purpose is to establish the cost of putting water onto this particular property.

The Court: You are asking about the power cost, and that is what he is objecting to.

Mr. Cranston: Yes, but there is no question of difference. That is, the Government is not to be—this does not affect the measure of damages of the Government, in so far [844] as the power costs have gone up or come down. I am led to believe they stayed the same, so I don't see the basis of Mr. Abbott's objection.

The Court: What is the relevancy of the question, then, if it doesn't—

Mr. Cranston: The question is this: Assume that it costs \$15 per acre-foot, say, to put an acre-foot of water on a particular piece of property.

(Testimony of Adolph G. Sutro.)

Then the rental value of that property would be less than if that same property could be irrigated with water which, we will say, would cost \$5 per acre-foot, because the tenant could afford to pay more for the land if he had to pay less for the water.

The Court: I see your point.

Mr. Cranston: So the purpose of this is to establish the cost of the water on the property, which would be one factor in the rental value of the property.

The Court: I see your point. Objection overruled.

Mr. Abbott: May I be heard briefly with respect to the point counsel last mentioned?

The Court: No, not right now. Later on.

The Witness: Would you please read me the question?

(The question was read.)

The Witness: Yes.

Q. By Mr. Cranston: What is that cost per acre-foot per acre? [845]

A. Up to and including 1950, irrigating the lower land, it would have been \$1.58 per acre-foot power cost.

Q. And what is the cost for irrigating the mesa land?

A. The cost of irrigating the entire ranch from 1951 to date would be \$2.77 per acre-foot.

Mr. Cranston: If the court please, I have various other questions, of course, to ask Mr. Sutro.

(Testimony of Adolph G. Sutro.)

I am wondering whether at this time, since we are nearing the hour of adjournment, I would be permitted to release him, and to recall Mr. Tedford to ask him a few questions which I was not permitted to ask him this morning, so that he may be released today, and at the court's convenience complete this examination, and that he be released for cross examination at a later time.

Mr. Abbott: I am anxious to accommodate Mr. Tedford, your Honor, but to the extent that Mr. Sutro's testimony is deemed to form a foundation for Mr. Tedford's testimony, I would like the opportunity to test Mr. Sutro's examination by cross.

The Court: That means you will not accede to his request; is that it?

Mr. Abbott: In effect, yes, sir.

The Court: All right. We will have to do that. I am sorry, Mr. Tedford. You will have to come back again. So you can go ahead with your cross examination. [846]

Mr. Abbott: I might make this suggestion, to accommodate Mr. Tedford: that his testimony may come in, but subject to a motion to strike if agreeable with counsel and satisfactory to the court, that if Mr. Sutro's testimony on cross examination fails to furnish the foundation required——

The Court: Of course, you never waive that. By making the concession, you would not waive that anyhow. You would have the right to move to strike out. I want to know whether you are willing to accommodate Mr. Tedford. If you are, say so.

(Testimony of Adolph G. Sutro.)

Mr. Abbott: Yes, your Honor, and in view of the court's last remarks, the Government is happy to do so, because no disadvantage will accrue.

The Court: All right.

Mr. Cranston: Then, Mr. Sutro, will you step down, and I will ask Mr. Tedford to resume the stand.

(Witness temporarily excused.)

CLARENCE P. TEDFORD

called as a witness on behalf of the plaintiff, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination

(Continued)

By Mr. Cranston:

Q. Mr. Tedford, I will show you again the document which you testified about during the morning session. At [847] that time you stated that this document or the contour lines on it had been prepared by men working in your office. Is that correct?

A. I understand not. I thought that they had. It looked like they were, but Mr. Sutro informed me that he had the survey, the contour survey made, although the outline of the fields and all that was done in our office.

Q. And have you checked the contours?

A. In what way do you mean?

Q. I mean, have your men checked the accuracy of the contours?

(Testimony of Clarence P. Tedford.)

A. Yes, they have. They have it all staked now.

Q. Now, Mr. Tedford, did Mr. Sutro consult with you concerning the location of a dam upon his property? A. Yes.

Mr. Abbott: I will object to that, your Honor, on the ground that once again it moves into the speculative. It isn't material. Even if damages of this type were proper to be awarded under the court's order, as I understand it, of September 29th, it is not oral conversations, it is not intentions of the plaintiff which are material, but the matters which have been reduced to plans, and specifications, and building contracts.

The Court: Overruled.

Mr. Cranston: Will you read the [848] question?

(The question and answer referred to were read.)

Q. (By Mr. Cranston): When did that consultation take place?

A. Oh, it is pretty hard for me to say exactly, but it has been, oh, two or three years ago. It must have been around '49, '50, something right in there, if I remember correctly.

Q. Well, I show you Plaintiff's Exhibit 40, and ask if there were any consultations prior to the making of that memorandum.

A. Well, I had had conferences with Mr. Sutro on the ranch at various times on various things that he was planning on doing. This is a survey that was made on the dam or reservoir. It is dated

(Testimony of Clarence P. Tedford.)

in '49, which I think was about the time that I consulted with Mr. Sutro, possibly prior to that, because I probably delegated the boys to make this survey shortly after I had talked with Mr. Sutro.

Q. Did he consult with you at or about the time he purchased the property in connection with any reservoirs?

A. I think we talked in a general way of a lay-out for his irrigation, and so forth, on the ranch, yes.

Q. How long was that after he purchased the property?

A. Well, it was probably very shortly afterwards, or during the time of purchase, probably, because, as I remember, he got in touch with us about the time that he did purchase [849] the property, and I was down over the property with him at that time.

Q. Now, there was one question this morning which I do not believe was ever answered. I think it was lost in some discussion. That was whether you had made an examination or determination as to the amount of excavation which would be required to place any acre of that property in a condition where it could be used for the planting of edible vegetables. The question was, did you make such a determination.

A. Well, in going over it, I looked it over pretty carefully, and in order to get furrow irrigation, and that would be what I would presume they would use on that, I made an estimate of in the neighbor-

(Testimony of Clarence P. Tedford.)

hood of 400 yards per acre that would have to be moved in order to get a good grade for furrow irrigation.

Mr. Abbott: I will move to strike as not responsive. The question was, was an estimate made, and not what was the estimate.

The Court: Overruled. Motion denied.

Mr. Abbott: If the answer remains in the record, I would like to make the additional objection, your Honor, that it is immaterial and irrelevant, and may not be considered in fixing the damages of this plaintiff.

The Court: The same ruling. Overruled.

Mr. Cranston: You may cross examine. [850]

Cross-Examination

By Mr. Abbott:

Q. Mr. Tedford, you testified this morning that various crops could be grown on the land in question. Among others you testified that flowers, vegetables for seed, alfalfa, black-eyed beans, all of those crops, could be grown on the tillable acreage of the Sutro ranch. Now, sir, will you please state whether all of those crops require an irrigation system.

A. Well, that depends. Dry beans, no. If you want to include dried beans—black-eyes, you say, or mention—that is usually a dry crop, although they can be irrigated very well.

There is one thing I would like to bring out, if I may, at this time.

Q. Well, no, sir.

(Testimony of Clarence P. Tedford.)

The Court: No, we have had enough of that.

The Witness: All right, sir.

The Court: Let the lawyers bring it out.

Q. (By Mr. Abbott): Well, let's take up those crops one by one, briefly. Alfalfa requires an irrigation system, does it not? A. Right.

Q. It requires a large quantity of water, does it not? A. Yes, on most soils. [851]

Q. Does it on the soil on the Sutro ranch require a large quantity?

A. Yes, on this bottom soil, yes. That is with one exception, if and when that is tile drained, it will take quite a little water. Of course, if the moisture is left in there and isn't drained out, why, it won't take much water for a year or two. Then your alfalfa is gone. It is drowned.

Q. In the period in which you examined the land, between 1946 and 1949, did the land have characteristics such as would indicate a large need of water for alfalfa?

A. No, I wouldn't say so.

Q. Would alfalfa being grown on the land during that period require as much water as truck vegetables?

Mr. Cranston: If the court please, I believe this is not proper cross examination.

The Court: I think it is. Overruled.

The Witness: I would say that probably in that location, that is, in this bottom area, it would probably take about the same amount of water.

Q. (By Mr. Abbott): How about in the other

(Testimony of Clarence P. Tedford.)

areas of the ranch? Would alfalfa there require as much water as truck vegetables would?

A. It all depends on your truck vegetables. Some truck vegetables take lots of water. Others don't take so much. Peppers would take less water. Celery would take [852] more water.

Q. Very good sir. Now, if truck vegetables were being grown solely for seed, would they require as much water as they would if grown for the market?

A. They would for a period, and then they usually slow down on the water for seed.

Q. When vegetables are being grown commercially, do they require as much water as do truck vegetables—correction—when flowers are being grown commercially, do they require as much water as do truck vegetables?

A. No, not ordinarily so.

Q. I will call your attention to the irrigation plan which is shown in Plaintiff's Exhibit 39, and in Plaintiff's Exhibit 38, and ask you if that irrigation plan is one which is suitable for the irrigation of alfalfa.

A. Well, now, listen. That is a steady job. That isn't a quick question.

The Court: I didn't hear that.

The Witness: I say that is a steady job, not a quick question.

The Court: I don't understand your answer.

The Witness: Well, you can't just look at a

(Testimony of Clarence P. Tedford.)

print and say that is A-1, or that isn't A-1, so far as an irrigation system is concerned. Offhand, I would say yes, because they have their laterals, and all, and you don't have too far to [853] run. Offhand, I would say it was probably a pretty good irrigating system, but then it takes time to figure out the volume of water you are applying, and how you are applying it, and everything, available water and everything, to really make a system. And this is the first time I have seen this.

Q. (By Mr. Abbott): Let me phrase the question this way, then, Mr. Tedford: Is it as good a system for alfalfa as it is for truck vegetables?

A. Well, there you are again. How are you going to irrigate it? Are you going to flood-irrigate it, are you going to sprinkle-irrigate it, or what are you going to do?

Q. I mean now the physical installation. I am not talking about——

A. As far as the pipeline, yes, it is excellent.

Q. And it is as good for alfalfa as it is for truck vegetables?

A. You do it in the same way.

Q. Is it as good for commercial flower growing as it is for truck vegetables?

A. I would say so.

Q. Is it as good for black-eyed beans as it is for truck vegetables? A. Sure.

Q. Is it as good for truck vegetables being grown for seed purposes as it is for truck vegetables being grown for [854] market purposes?

(Testimony of Clarence P. Tedford.)

A. Your irrigation would be identical.

Q. In other words, the same system would be used for all those purposes; is that right, sir?

A. Yes, pretty much so.

Q. Were you on the Sutro land during each of the years from 1946 through 1952?

A. Oh, I would say probably, yes. I couldn't verify that very well, but I have been on the ranch a couple of times practically every year.

Q. And was alfalfa being grown on the land during the period when you were on the land?

A. It was being grown on the land at the time they were just contemplating—at the time the farm plan was written there, yes, sir.

Q. Did Mr. Sutro, when he talked with you in 1946, show you any plans and specifications for an irrigation system?

A. I don't remember that, whether he did or not. We talked of it, I know that, but I don't think we ever made a plan for him.

Q. Did he show you any plans of his own that he had? A. Not that I remember.

Q. Or specifications? A. No. [855]

Q. I understood you to say, Mr. Tedford, that you are yourself a farmer at the present time?

A. Yes, I have retired to the farm.

Mr. Abbott: Your Honor, at this time I propose to go into certain examination which is properly by way of rebuttal to anticipated testimony of the plaintiff. I do so as a convenience to this witness, so that he will not be caused to come back

(Testimony of Clarence P. Tedford.)

up this long distance, and I would like to do so subject to the understanding that our objections to the evidence which I propose to rebut are not in any way waived, but I simply want to get this information in the record now for convenience.

Mr. Cranston: For this purpose you are making Mr. Tedford your own witness?

Mr. Abbott: For this limited purpose. Is that understood, counsel, that the examination will not in any way constitute a waiver of the objections we may make?

Mr. Cranston: Yes, that is understood.

Q. (By Mr. Abbott): Where is your farm, Mr. Tedford? A. It is in Fallbrook.

Q. How many acres do you farm?

A. Forty.

Q. What crops do you raise?

A. Avocados and lemons.

Mr. Abbott: No further questions, your [856] Honor.

Mr. Cranston: No further questions, your Honor.

The Court: Then I am going to excuse Mr. Tedford now.

Mr. Cranston: Yes.

The Witness: Thank you.

(Witness excused.)

The Court: I think we will recess now, gentlemen, until 10:00 o'clock in the morning.

Mr. Cranston: Very well.

The Court: Unless we make a little better time, gentlemen, I am going to lengthen these sessions a little bit. We haven't made very much time so far. 10:00 o'clock in the morning.

(Whereupon, at 4:22 o'clock p.m., an adjournment was taken until 10:00 o'clock a.m., Tuesday, March 2, 1954.) [857]

Tuesday, March 2, 1954, 10:00 A.M.

The Court: All present. Proceed.

ADOLPH G. SUTRO

the plaintiff herein, having been heretofore duly sworn, resumed the stand and testified further as follows:

Direct Examination
(Continued)

By Mr. Cranston:

Q. Mr. Sutro, yesterday afternoon, just before we interrupted your testimony for certain testimony of Mr. Tedford, who was recalled, you had given information as to the cost of power for pumping water to irrigate your lands, and you gave one figure as to the cost before 1950, and another figure as to the cost per acre foot after 1950. Can you explain what causes the difference in the two figures?

A. Yes. The average cost would go up after 1950 because we would then be irrigating the higher lands, and it would require more power to pump the water to a greater elevation.

Q. Would the cost for irrigating the lower lands

(Testimony of Adolph G. Sutro.)

remain the same or go up after 1950?

A. I averaged the cost over the entire area. Without consulting my figures, I am unable to answer the question.

Q. Was there any appreciable change in power rates during [859] that period?

A. No, there was no change in power rates during that period.

Q. Now, you testified at the prior trial that in 1950 you dug another well on your property, in addition to the well which had been there at the time you bought the property?

A. Yes.

Q. How was that well located?

A. I——

The Court: Was that the well down on Pilgrim Creek, the second well?

The Witness: Yes, your Honor.

The Court: He described that before. Didn't he describe that? The location, I mean? Didn't he describe that pretty thoroughly before?

Mr. Cranston: If he has, your Honor, we won't go into it again.

The Court: I think he did.

Mr. Cranston: I wasn't certain that was in the record.

The Court: My recollection is that you did. Isn't that right?

The Witness: We described the location on the map. I don't so understand Mr. Cranston's question. I thought he said how it was located, and not where it was located.

The Court: If it was a play on words—I thought you [860] meant the same thing.

(Testimony of Adolph G. Sutro.)

Mr. Cranston: No, I was meaning the manner in which it was located, why that particular spot was chosen.

The Court: Very well.

The Witness: Why, I was able——

The Court: Raise your voice a little. I don't hear you too well.

The Witness: Certainly. I was able to obtain the assistance of a man whom I regarded as competent to locate a well, he looked over the vicinity, and told me where to drill, and we found water.

Q. (By Mr. Cranston): Have you made tests for the production of this well? A. Yes.

Q. Can you state what those tests show?

Mr. Abbott: The witness appears to be referring to a document. We would like an opportunity to see what he is referring to.

Mr. Cranston: Yes, you may.

(Handing document to counsel.)

The Witness: This is page 1 of the test. You asked me about the first well?

Mr. Cranston: Yes. I think Mr. Abbott would like to examine it before you testify to it, if you will show him the pages. [861]

The Witness: Oh, excuse me.

Q. (By Mr. Cranston): When did you make this test, Mr. Sutro?

A. From November 11th to November 13th, 1953.

Q. The notes in your hand, were they made by you? A. Yes.

(Testimony of Adolph G. Sutro.)

Q. And when were they made?

A. Immediately after the completion of the tests. They were transcribed from the sheets on which were kept the original well log in the field.

Q. What did the tests show?

A. Well, there are six pages of tests, Mr. Cranston. Would you mind just telling me which tests you have in mind?

The Court: Let me suggest a method of expediting the trial properly. Counsel for the government has seen these memoranda. Apparently they are in your handwriting, Mr. Sutro?

The Witness: Yes, your Honor; prepared by me.

The Court: If you are going into these tests seriatim, just put the whole thing in.

Mr. Cranston: Very well. We will introduce the memoranda in evidence. We will offer it.

Mr. Abbott: May I ask one question on voir dire relative to the admissibility of the documents?

Mr. Cranston: Yes. [862]

Mr. Abbott: Mr. Sutro, did you make the particular measurements which appear in the six pages of notes you are now holding?

The Witness: Mr. Abbott, this was a non-stop test, 49½ hours. I slept occasionally and did not make all the measurements.

Mr. Abbott: Did you make some of those measurements?

The Witness: Yes, Mr. Abbott, frequently.

Mr. Abbott: Who made the measurements which you did not make?

(Testimony of Adolph G. Sutro.)

The Witness: Usually my foreman. In order to obviate any chance of error, the test readings were taken at 15-minute intervals; more frequent than is usual.

The Court: Now, this foreman is available, isn't he, Mr. Sutro?

The Witness: Yes.

Mr. Cranston: Yes, he will be available if they wish to question him.

The Court: Have you made the offer?

Mr. Cranston: I have made the offer in evidence.

The Court: It will be received.

The Clerk: That will be Exhibit 41 in evidence.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 41.)

Q. By Mr. Cranston: Mr. Sutro, did you later dig a [863] third well?

A. Yes, Mr. Cranston.

Q. And did you make tests on that well?

A. Yes.

The Court: Let me see it.

The Clerk: Yes, your Honor.

(The document was handed to the court.)

The Court: The Webb's gauge, is that a commercially known gauge for those purposes?

The Witness: That is the name of the owner of the gauge, your Honor. I had one of my own also, and there was one belonging to the pump company.

The Court: Proceed, Mr. Cranston.

(Testimony of Adolph G. Sutro.)

Q. (By Mr. Cranston): I show you six pages of a notebook, and ask you if those are in your handwriting.

A. Yes, Mr. Cranston.

Q. When did you make those notations?

A. Immediately after the completion of the test on No. 3 well.

Q. Did you personally participate in the making of that test? A. I did.

Q. Did you make some of the readings?

A. I did.

Q. Did you supervise the making of other [864] readings?

A. I did, when I was awake.

Mr. Cranston: I will offer these pages in evidence in the same manner, then, your Honor.

The Court: The same ruling. Received.

The Clerk: Plaintiff's Exhibit 42 in evidence.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 42.)

Q. (By Mr. Cranston): Mr. Sutro, at the time you purchased the property, and prior to the order made by the Board of Health directing Mr. Norman Brown to dismantle certain equipment, what area had he been irrigating?

Mr. Abbott: I will object to that as assuming an erroneous state of the record. I think counsel may be confused in framing the question.

Mr. Cranston: I think you are probably right.

(Testimony of Adolph G. Sutro.)

I should have stated: Prior to the time the order was made by the Board of Health, what area had Mr. Brown been irrigating?

Mr. Abbott: I will object to that. This witness has by prior testimony shown no knowledge of the circumstances existing at the time which counsel describes. He has testified that when he negotiated with Brown the order had already been made. He had not seen the land prior to the time the order was made.

Mr. Cranston: I believe the witness could testify to the physical evidence on the land, as to what had been done. [865] In other words, there was no showing in the record that the physical evidence did not remain as to the area that had been irrigated.

Mr. Abbott: That isn't the question that is now pending.

The Court: Objection overruled.

The Witness: Mr. Brown represented to me, and I have no reason to doubt his representations——

Mr. Abbott: I will object, your Honor. The witness is about to testify to hearsay.

The Court: Yes.

The Witness: Okay. Excuse me.

Q. (By Mr. Cranston): Could you tell from a physical examination of the property what area had been irrigated recently prior to the time you purchased the property?

A. I cannot tell—I cannot testify as to what area had been irrigated. I can testify as to what area

(Testimony of Adolph G. Sutro.)

had been cultivated, because I did not see water being placed on the ground, and at the time of my purchase the crops had been harvested.

Q. Very well. Do you know where Mr. Norman Brown is at the present time?

A. The last I heard of Mr. Brown, he was a professional dog handler, and he was following the field trial circuits with hunting dogs. If he is not on the field trial circuit, he may be at the headquarters of his employer, which is somewhere [867] in the middle of the Straits of Juan de Fuca.

The Court: Training dogs in the Straits of Juan de Fuca?

The Witness: On an island, your Honor. Excuse me.

Mr. Cranston: Your Honor, I believe this concludes our examination on one phase of the testimony in this case.

I would like, if possible, before the close of the day to put on our expert on land rental values. Mr. Sutro will have occasion to testify as to building plans and specifications and certain other matters, which would not affect the land rental value, however, as such.

With the court's permission, I would like to have Mr. Abbott now cross examine Mr. Sutro on testimony already in, so that we could put on our expert on land rentals, and then have the testimony as to the buildings and the specifications, and so forth, and any other matters to come in later. That will make it unnecessary for our rental expert to remain available for an indefinite period.

(Testimony of Adolph G. Sutro.)

Mr. Abbott: We have no objection to the order of proceeding as counsel suggests.

The Court: Very well.

Cross-Examination

By Mr. Abbott:

Q. Mr. Sutro, on your direct examination you testified to the price that you paid for the property described in your [867] complaint. What, in your opinion, was the fair market value of the property at the time that you purchased it?

A. In my opinion, the fair market value—may I ask you to clarify that question? Are you referring to the fact that certain parts of the land had been rendered unfit to use—for use, and the fact that that condition was increasing daily? In other words, will you be——

Mr. Abbott: I will move to strike the witness' remarks because they are not responsive. I will clarify the question.

The Court: Yes. I think the question is clear to the court, and I think it should be to you. The answer will be stricken as not responsive.

The Witness: Would you repeat the question?

Mr. Abbott: The reporter will read it back to you, Mr. Sutro.

(The question was read.)

The Witness: I had not arrived at a definite figure. However, I thought I was obtaining a bargain.

(Testimony of Adolph G. Sutro.)

Q. (By Mr. Abbott): Had you known Mr. Brown prior to the time that you negotiated with him for the purchase of this property?

A. No.

Q. Is there any reason why the transaction between Mr. Brown and yourself was not an arm's-length bargaining transaction? [868]

A. None that I would know of.

Q. Do you have an opinion as to the fair market value of the property as of the date you purchased it absent the discharge of effluent from sewage plants 1 and 2?

A. Yes. Based on an appraisal of a man on the Farm Loan Committee of a national bank, who placed a value of \$80,000 on part of it, I would state I think that appraisal was reasonable.

Q. Is that your own opinion?

A. That would be my opinion.

Q. Now, calling your attention to the date that the discharge of effluent from both sewage disposal plants ceased, are you familiar with that date, Mr. Sutro?

A. Yes.

Q. Will you state for the record what it is?

A. July 22, 1952.

Q. As of the date last mentioned, what was your opinion of the fair market value of your property?

A. I have never formed an opinion as to the fair market value.

Q. In your opinion, was it as much as the \$80,000 figure which you have previously testified to?

A. Yes.

(Testimony of Adolph G. Sutro.)

Q. Mr. Sutro, have you commenced the construction of the irrigation system which appears to be outlined in some detail [869] in Plaintiff's Exhibits 38 and 39?

Mr. Cranston: Mr. Abbott, here is one of them.

(Handing document to counsel.)

The Witness: No, Mr. Abbott.

Q. (By Mr. Abbott): Have you let any contracts for that work?

A. No, Mr. Abbott.

Q. Now, Mr. Sutro, will you explain to the court why this irrigation system wasn't commenced in 1946, shortly after you purchased the property?

A. At what time in 1946?

Q. Will you explain why it was not commenced at any time in the year 1946?

A. Would you clarify that by telling me what was the current Navy plan at that time?

Q. Let's go at it this way: Plaintiff's Exhibit 37 consists of a series of letters ranging in date from December 27, 1945, through November 13, 1946. Those letters contain certain references to pipelines, dam or dams, pumps. Now, can you state when you abandoned the intention of doing the things that you refer to in a general fashion in that correspondence?

A. Mr. Abbott, you are asking me an engineering question. You are not giving me the data on which to give you an answer. I asked if you would clarify the date on which you [870] wanted the

(Testimony of Adolph G. Sutro.)

answer. I also asked you if you would tell me the status of the current Navy plan. I cannot answer an engineering question without——

Mr. Abbott: Would you read the particular question that is pending, Madam Reporter?

(The question was read.)

Q. (By Mr. Abbott): The question calls for a date, approximate if you will, but a date, Mr. Sutro.

A. I believe I—may I answer the question by calling your attention to some former testimony? I believe I testified to the fact that from the pump specifications I was over a considerable period of time trying to reconstruct backwards the design assumptions, and was unable to do so. I believe that appears in my early testimony in this case.

Now, if you wish me to answer the question, will you give me the assumptions on which—the necessary assumptions to answer your question?

Q. Mr. Sutro, I am asking a question which only you can answer, the question of your state of mind. When did you abandon an intention? Can you answer that question?

A. Which intention, Mr. Abbott?

Q. The intention to do the things which you allude to in a general fashion in the correspondence which is identified in the record as Exhibit 37.

A. Mr. Abbott, we have never abandoned the intention. [871] I have been working for eight years to put that in.

Q. Well, is it your testimony, then, Mr. Sutro,

(Testimony of Adolph G. Sutro.)

that continuously during this period from 1946 to date, you have planned to install the various systems you allude to and have more particularly described in your testimony, but that you simply didn't know how the Navy was going to control the flow of water in Pilgrim—is that the situation?

A. That would be one of the factors, Mr. Abbott, which would govern the construction of the system.

Q. You were concerned as to whether there would be enough water in Pilgrim Creek from the effluent to justify doing the work?

A. I did not say that. Your question was——

Q. I am asking you that now.

A. That would depend on the type of work which was contemplated. If it was contemplated to use the effluent, that would be an important factor. If it was not contemplated to use the effluent, that would be an immaterial point. I will be most happy—I assure you, Mr. Abbott, I am not trying to avoid answering your question—if you will give me the assumptions which will permit me to answer it intelligently, I will be most happy to do so.

Q. I am endeavoring to, Mr. Sutro. During this period in 1946, when you were writing the correspondence alluded to, was it your intention to use the equipment referred to there [872] in pumping effluent from Pilgrim Creek to various points on your land?

A. That was part of the intention.

(Testimony of Adolph G. Sutro.)

Q. And what part of the intention have I not stated?

A. What I intended doing with my well.

Q. You intended to use part of this equipment also to harness the water in Well 1?

A. Depending on the current Navy plan.

Q. Well, it was a problem, then, of water availability whether or not you would have all of the effluent; is that the fact, Mr. Sutro?

A. No, it was a problem of whether a temporary expedient should be put in, and if I could amortize it by the time the Navy made its final decision.

Q. Were you at all concerned about the pollution, if there was pollution in Pilgrim Creek, as it related to this plan?

A. Certainly. We wrote many letters regarding it.

Q. What was the date of the first letter you wrote regarding it, Mr. Sutro?

A. The first written correspondence was on September 4, '46, after the Marine Corps had been unsuccessful in their efforts to purify the well on former occasions. In other words, in dealing with the Marine Corps, with Pendleton, it was easy enough to go over there and talk to them. However, the letter, [873] if I recall correctly, was addressed to the Commandant of the Eleventh Naval District.

Q. And that letter requested that the effluent be terminated?

A. The letter requested that advice from your

(Testimony of Adolph G. Sutro.)

expert engineers be given in regard to methods that would prevent the pollution of my well.

Q. Now, Mr. Sutro, you recall testifying in this cause on Monday, Tuesday and Wednesday, July 20, 21st and 22nd, do you not?

A. I believe I testified on those days.

Q. I will call the court and counsel's attention to the material beginning at page 267 of the transcript of those proceedings, and read you a part of the transcript, Mr. Sutro, and at the conclusion of the reading I will ask you if you recall so testifying. Starting with line 21 of page 267:

"Q. (By Mr. McCall): Now, Mr. Sutro, you testified in your contacts with the Navy, and the officials and persons connected with it, that you had never requested them not to discharge the sewage into Pilgrim Creek; now, I want to ask you if in any letter that you addressed to any of the officials of the Navy you made any contention at all that the plants themselves as operated could have been operated better [874] or differently so as not to produce the pollution?

"Mr. Cranston: If the court please, I will object to that as assuming a statement that was made by the witness which was not made by the witness, and also as a compound question.

"The Court: Well, it is a compound question. You ought to separate it, Mr. McCall.

"Q. (By Mr. McCall): Well, you did testify, Mr. Sutro, on Friday that you never asked the Navy to stop discharging the sewage into Pilgrim Creek?

(Testimony of Adolph G. Sutro.)

“A. I believe, Mr. McCall, I said ‘Yes, but I thought I would like to check my files further;’ so in answer in that respect and in keeping with your request, I have done so, and the times that we have requested the Navy to cease the flow were, I believe, around March 31st, 1951. I sent a letter to Mr. Cranston asking him to ask the Government to stop the flow. I believe that on November 24, 1952, a meeting was held in Camp Pendleton, in the Quartermaster’s Office. Present at that meeting were Colonel Chester Allen, Camp Quartermaster, I believe; Colonel Stone, an aide; the Public Works Officer of Camp Pendleton, whose name slips me; William [875] Taylor, the Ranch Manager for Camp Pendleton; Colonel Robertson, a special officer sent out from the Marine Corps Headquarters from Washington to deal with water problems; Mr. David Agnew, Special Attorney for the United States Navy, Bureau of Yards and Docks; yourself, Mr. Cranston, and myself; there may have been others present, I do not recall.

“At that meeting I asked Colonel Robertson if the Marine Corps would agree to stop discharging sewage into Pilgrim Creek. He said they would. I asked him if he would put it in writing. He drew up an agreement—he drew up, shall I say, a document. He was told, I believe, by you, not to sign it.

“Q. The first request was in a letter, then, that you addressed to your attorney, Mr. Cranston, and not to the Navy?

(Testimony of Adolph G. Sutro.)

“A. That is the first one I could locate in my files.

“Q. That was March of 1951. You had been writing letters, then, about this matter for five years, had you not, when you wrote your lawyer and asked him to ask them not to discharge the sewage into the creek? [876]

“A. We had been writing letters for five years to get a reply to my letter of September 4th—I had been.

“Q. And you hadn't before March 25, 1951, asked anyone to stop discharging sewage into the creek; is that correct?

“A. That was the first case I could find.

“The Court (To the Reporter): Will you read that last question?

“(Answer read.)

“The Court: Well, I don't understand that last answer.

“The Witness: Excuse me.

“The Court: I thought you were asked the direct question whether you had asked the Marine Corps to stop putting sewage in the creek.

“The Witness: Excuse me, your Honor; I have no record of a prior request.

“The Court: You have no record? Have you any recollection?

“The Witness: No, your Honor.”

Do you recall being asked those questions and giving those answers, Mr. Sutro?

(Testimony of Adolph G. Sutro.)

A. I do, Mr. Abbott.

Q. Now, let's call your attention to the date in 1950 [877] when you drilled the wells that you have just described. You found, did you not, as a result of the tests which you have described, that there were ample sources of water under the ground on your ranch?

A. Yes, Mr. Abbott.

Q. Will you please explain why an irrigation system along the lines you have described in court was not constructed at that time?

A. That was on July 21, 1950?

Q. Well, the particular dates when you drilled the wells. You have previously testified to those dates.

A. Well, I was just confirming it.

Q. I believe that was November, 1950.

A. The first well was tested December 16, 1950. Is that the—shall we assume that is the date for the question?

Q. It may be.

A. And you wish to know why I did not construct an irrigation system immediately?

Q. Yes, sir.

A. Because the report from the San Francisco Board of Health showed a bacteria count in excess of 1,000,000 colonies per cc, and the inspector asked me if I was playing a joke on them and giving them pure sewage to analyze.

Q. Well, now, isn't it a fact that alfalfa was being grown on your land at that time, Mr. [878] Sutro?

(Testimony of Adolph G. Sutro.)

A. Excuse me. I thought you asked me why I didn't construct an irrigation system at that time. It is a fact that alfalfa was being grown at that time.

Q. And that alfalfa required large amounts of irrigation water? A. Yes, Mr. Abbott.

Q. Let's call your attention now to the date of July 1952, when, according to the record in this matter, all sewage effluent discharge from the Marine Corps Base ceased. Will you explain to the court why the irrigation system you described wasn't built at that time?

A. Why, certainly. In this testimony in this transcript the court asked me, do I have—I believe I said I had no record, and the court asked me, "Do you have any recollection, Mr. Sutro?" And I said, "No." I have a recollection now.

Q. Well, then please answer.

A. You are asking me why I did not do it?

Q. All right.

A. One of the reasons was we had applied for an injunction in the federal court and had been told that the Tort Claims Act did not cover injunctive relief.

The Court: You mean by that that you now remember, and that you forgot then?

The Witness: Yes. I had forgotten we had applied for an [879] injunction and been turned down. It is a part of the record in Judge Weinberger's pre-trial.

Q. (By Mr. Abbott): Now, you heard the testi-

(Testimony of Adolph G. Sutro.)

mony of Mr. Cannon in July, of 1953, when Mr. Cannon made the statement, which I am paraphrasing, but will go to the record if counsel has any objection—made the statement to the general effect there was no possibility of further effluent being discharged into Pilgrim Creek because of the arrangements made.

A. That was in July, of 1953?

Q. Yes, sir.

A. At the time of the final——

Q. At the time of the last hearings in this matter.

A. I am doing what I can to get things started. I expect to proceed immediately with the construction of the irrigation system, as soon as I am made whole. After all, I am not made of money, and I have to cut my suit to fit the cloth.

Q. Well, is it your explanation, then, Mr. Sutro, that for reasons of financial inability you haven't installed the irrigation system?

A. You mean since July to date?

Q. At any time.

A. No, that is not my explanation. You asked me if I had heard Mr. Cannon's testimony of July 22, 1953, I believe. What have I done since that time? Is that your question, Mr. Abbott? [880]

Q. That was my question.

A. I said I had been working on getting things ready, that construction had not started, until I was made whole, because after all I would have to cut the suit to fit the cloth.

(Testimony of Adolph G. Sutro.)

Q. Well, is it your testimony that you neglected or failed to install this system between July of 1953 and the present date because of financial inability?

A. No, that is not my statement. My statement is that I may have to eliminate irrigating a part of my ranch until I see what the court does for me in this matter.

Q. Do you have ample funds to install the system, part from whatever recovery you may have in this action, Mr. Sutro?

A. I believe that I could manage it, and I might have to skimp somewhere else.

Q. You mean skimp somewhere else in your investments, not in your personal standard of living?

A. My personal standard of living, Mr. Abbott, is very modest.

Q. Then the skimping would be in the terms of your other investments, I take it?

A. Yes, Mr. Abbott.

Q. Now, did you investigate underground sources of water at the time that you purchased the property in 1946, Mr. Sutro?

A. No, Mr. Abbott, not until this man looked at it. [881]

Q. Of course, you were aware that there was a well on the property when you bought it?

A. Oh, yes.

Q. And did you make any efforts to ascertain how large a basin was pumped by that well?

A. No. I only relied upon its history, Mr. Abbott.

(Testimony of Adolph G. Sutro.)

Q. Did you make any efforts to ascertain whether additional wells could be drilled on the property to tap the same basin, in order to secure larger quantities of water?

A. Not until I asked this man to tell me where to drill.

Q. In 1950? A. In 1950.

Q. In your contacts with the Soil Conservation Office at Fallbrook, did you ask them if they had information relative to water basins under the land on the area of your ranch?

A. No, just merely looking at the topography, I thought it might be worth inquiring into.

Q. You thought it might be worth inquiring into at what date, Mr. Sutro?

A. Well, as long as the various Navy plans were in effect in regard to purifying the creek water there was no reason for investigating additional underground supplies.

Q. Really what you were concerned with was whether or not you would continue to receive the large volume of effluent, [882] and whether you could install a system which would make use of that large volume of water; isn't that the case?

A. That is not the case.

Q. Then what changes in the Navy's plans were material to your inquiry?

A. Well, to start again, if we may, or if I may, I would be very happy to figure this for you. I believe you said any date?

Q. It is a very, very wide question, Mr. Sutro.

(Testimony of Adolph G. Sutro.)

What changes in Navy plans were material?

A. I would have to know what plans you have in mind. After all, your own witness, Mr. Abbott testified that dozens of plans were contemplated. Therefore, I would have to give you dozens of answers unless I knew which plan you were speaking of.

Q. The plans that were contemplated were plans relating to the volume of fluid which would be flowing in Pilgrim Creek at any particular time, were they not?

A. They were not.

Q. I think the prior record will speak for itself on that. Did you at the time that you purchased the property inquire into the types of crops which could be raised on the land, Mr. Sutro?

A. I think I did.

Q. You knew that there was possibly fluid water there, [883] so you were interested in alternate crops, were you not?

A. No, I was not particularly interested in alternate crops at the time. If you recall my original testimony in the original trial, I thought that when a condition of pollution was brought to the attention of the Navy, or the government, when they are the leading exponents of pure water, that it would be corrected immediately.

Q. So you felt that as soon as you requested someone to cease the polluting of the stream, that action would be taken and that you could grow the truck vegetables that you wanted?

A. I thought an effort would be made to operate

(Testimony of Adolph G. Sutro.)

the plants in such a manner as to properly purify the effluent.

Q. If you were to so request and call their attention to the condition existing?

A. I believed it was the law of the State of California, and that they would be happy to comply with it.

Q. In any event, did you at any time from 1946 until July of 1952 inquire into the other crops which could be grown on the land? By "other crops" I mean crops other than edible truck vegetables.

A. Yes, Mr. Abbott. I will reply to you somewhat as your own engineer did in regard to the Pilgrim Creek plan. I don't know anything that we did not inquire into in an effort to mitigate the damages. [884]

Q. And you investigated the possibility of growing flowers commercially upon the land?

A. That was looked into.

Q. And you looked into the possibility of growing vegetables for seed on the land?

A. That was looked into.

Q. And you looked into the possibility of growing alfalfa? A. That was looked into.

Q. And of growing black-eyed beans?

A. Black-eyed beans were discussed.

Q. And probably several other crops also were discussed?

A. I said their number was infinite.

Q. You have heard Mr. Ikemi describe the irri-

(Testimony of Adolph G. Sutro.)

gation system which he used on the land. Was that system still there, with the exception of the change of pump which Mr. Brown effected, at the time that you purchased the land, Mr. Sutro?

A. No. Excuse me. Will you repeat that question?

Mr. Abbott: Yes. The reporter will read it.

(The question was read.)

The Witness: Mr. Abbott, would you explain the phrase, "the change in pump"?

Q. (By Mr. Abbott): Well, there has been testimony in [885] this present hearing to the effect that Mr. Brown put a new pump into the system being used by Mr. Ikemi. Now, with that exception, was the system used by Ikemi still physically present on the property at the time that you purchased it?

A. No, Mr. Abbott.

Q. What portions were missing?

A. In accordance with the edict of the Board of Health, the creek pump had been dismantled and removed.

Q. With the exception of the removal of the creek pump from the sump pit, was the balance of the system in existence?

A. Was the balance? I know what system was in existence at the time I purchased the ranch.

Q. Well, was that the system that Mr. Ikemi described yesterday, excluding the changes already alluded to?

A. It sounds as if it may be.

The Court: Just a minute. I want you to clarify

(Testimony of Adolph G. Sutro.)

that. I heard what Mr. Ikemi said, and I presume that you did also.

The Witness: Yes, your Honor.

The Court: What do you mean by "it sounds"? You heard what he said, and he described it specifically, didn't he?

The Witness: Well, there were certain changes that Mr. Brown made in the pump and the Ikemi pump—the creek pump had been dismantled, and so forth, and the question now is, as I see it, did Brown make any other changes between the [886] time he purchased the ranch from Ikemi and the time he sold it to me, and all I can say is that in general it seems to be the same. Brown might have made several changes, but I would not be familiar with them.

The Court: That was the way you understood Mr. Abbott's question, was it?

The Witness: Yes, your Honor.

The Court: Proceed.

Q. (By Mr. Abbott): Now, Mr. Sutro, calling your attention to Plaintiff's Exhibits 38 and 39, which are the charts prepared by you or under your direction last fall, charts relating to your proposed irrigation system, that is a system which is suitable for irrigating alfalfa, is it not?

A. Yes, Mr. Abbott.

Q. And for irrigating flowers grown commercially? A. I doubt it.

Q. For what reason is it not satisfactory for the latter purpose?

(Testimony of Adolph G. Sutro.)

A. Because most of the flower growers whose installations I have noticed use what is known as an oscillating overhead sprinkler line. This system, in order to save money, wherever possible, uses low-priced concrete pipe. It will not stand the pressure sufficient to operate an oscillating line.

Q. If the specifications for the pipe were changed, would the system be as suitable for growing flowers commercially [887] as it is for growing truck vegetables?

A. When you say the specifications were changed, to what specifications are you referring, Mr. Abbott?

Q. If the specifications were changed to iron or aluminum pipe, would it be as suitable for one purpose as for the other?

A. If the specifications were changed to iron, aluminum or steel pipe, it would irrigate flowers.

Q. Is it a system which is suitable for the irrigation of vegetables grown for seed?

A. If it were possible to grow vegetables for seed there, the system would be very satisfactory.

Q. Well, in general——

A. In general, I said the system would be very satisfactory.

Q. In general, this is a flexible irrigation system that can be used where irrigation is required on virtually all crops which will benefit by irrigation; is that not a fact?

A. To a large extent. The only exception that occurs to me offhand, there may be others, is flower

(Testimony of Adolph G. Sutro.)

growing, on certain portions of the system.

Q. When did you sell Sutro Baths?

A. September, 1952.

Q. Now, during the period between the purchase of the [888] property by you and the present time, have you owned common stocks?

Mr. Cranston: If the court please, I do not see the materiality of that question.

Mr. Abbott: I would be happy to explain it, your Honor.

The Court: Is it on this question of interest that was raised?

Mr. Abbott: No, your Honor, it is a wholly separate question. The materiality is this: The theory of plaintiff's damages in this case in part is that due to inflation building costs have increased from 1946 to the present time.

Now, inflation has not been limited to the building industry. If the moneys which were to be invested in the improvements he described during this interval have been invested in equity type investments, real estate, common stocks, things of that type, then those values have been increasing at the same rate or perhaps a greater rate than have building costs.

If this be speculative, your Honor, it is no more speculative than the very item of damage which we are seeking to rebut.

The Court: I don't know—we have had so many novel principles suggested in this case—where are we going to terminate the novelty of these princi-

(Testimony of Adolph G. Sutro.)

ples? But I never understood [889] that one who is injured by a tort could, or the wrongdoer could as an offset to the detriment, the damages, claim that the injured party was not damaged because he invested money in other enterprises and made it.

Mr. Abbott: I have never seen a case, your Honor, where inflation was used as a factor to increase the damages suffered by the plaintiff, but if inflation has affected the cost of these improvements, it has affected the value of the investment in which the money has been held pending the time, according to his theory of the facts, when he could have erected the improvements—there is novelty in our argument, but there is novelty in the damages which the plaintiff seeks.

The Court: There is a good deal of novelty in the plaintiff's case, too. I think the court has adverted to it several times, and called attention to the crucial aspects of damages in this case very early in the proceedings, and that is still the court's mind, pioneering, but that is going a little too far. We have to take the inflationary condition into consideration, particularly on the question of market value. I think the court has previously expressed itself that this question of market value in the inflationary period was a very uncertain matter, notwithstanding the very eminent experts who testify about it, that it is what the buyer wants to pay and what the seller wants to convey his property for. That is hardly a criterion of market value, as we understood [890] the term, and we understand

(Testimony of Adolph G. Sutro.)

the term in the cases. But I don't believe because a man has dual commercial activities, that where he has been injured by a tortfeasor as to one of his activities, that the party injuring him can say, "Well, you weren't damaged, because you have a lot of stocks and bonds, and you invested in an inflationary period in the stock market, and you made so much money. Well, we just offset your damage here by what you made in this other enterprise."

Mr. Abbott: That is not our argument, your Honor. It isn't quite that. It is this: That the very gravamen of this item of damages he seeks, an essential element in the chain of the element of proximate cause is inflation. Inflation is a two-edged sword.

The Court: But he isn't responsible for the inflationary aspect. Neither is the government responsible for it. It is a condition in the economy of the country that exists. You cannot ascribe any reason for it. You may point to war activities and the war economy, and all of those matters, the excess of population and therefore the demand for things that raise the price, but I think we are getting into a realm of economics here that can hardly be attached to any legal principle. We are all hopeful that this is simply a temporary condition, and that these so-called emergencies that brought it about will disappear. Some of us feel that they will disappear [891] with proper administration. Others with perhaps persuasive arguments say that it is fixed and attached, and we are going to con-

(Testimony of Adolph G. Sutro.)

tinue to have episodes of emergency created for the purpose of stifling the constant increase in the cost of materials and services. I am not going to get into that realm. We are going to pioneer here as much as we can, but I do not believe that is a proper subject matter of inquiry here.

Mr. Abbott: I think it is like non-Euclidian geometry, when you start with some new basic premises you come out with a number of new results over an ever-expanding field.

The Court: Yes, but in my judgment these are not basic aspects of the economy. Even the protagonists for the spending idea say that that is caused by emergencies. There are emergencies that arise because of conditions that prevail not only here but throughout the world. How long are those emergencies going to continue? Is it going to become a fixed policy? Personally, I do not think that it is, and I have just the confidence in our economy that eventually it will be adjusted. It is going to be tough and hard to do it. There are people who have been getting beneficenses and relying upon them in business—I am talking about business now—and it is hard for them to pry themselves loose from that. The economic and political system of today indicates that, and the history of the times, but the farm situation has so attached [892] itself that subsidies are required.

Now, are those matters legal principles that we can standardize in tort cases? I do not believe so.

(Testimony of Adolph G. Sutro.)

Some other court will have to take that burden. I am not going to do it.

Now, what is the state of the record?

(The record was read.)

The Court: Sustained.

Mr. Abbott: With deference to the court's ruling, we would nevertheless like to ask a limited number of questions along the same line to make the record in this matter.

The Court: Go ahead.

Q. (By Mr. Abbott): Mr. Sutro, during the period commencing with the purchase of the subject property and ending with the present time, have you continuously owned real property other than the ranch in question?

Mr. Cranston: The same objection, your Honor.

The Court: Well, that may be. Now, he has testified—I presume he is going to testify, and has already testified partially to the value of this property, and I presume that it is the weight of the opinion of an owner of property. If a man has not ever bought property and sold it, his evidence as to the value of that property certainly does not have the weight, should not have the weight that one who has been dealing in property has. I think he might answer that question. I will permit him to answer that question. [893]

The Witness: Would you read the question, please?

(Question read.)

(Testimony of Adolph G. Sutro.)

The Witness: No.

Q. (By Mr. Abbott): Have you owned real property during any of that period? A. Yes.

Q. For what years, what periods?

A. Until September of '52.

Q. Now, you were asked in the preceding question whether you were the owner of real property other than the subject ranch, and if it was not continuous from the purchase of the subject ranch until the present date. Since it was not continuous, will you define the particular periods in which you owned other real property?

A. I owned other real property until September of 1952. I thought that was my statement.

Q. Perhaps I misunderstood. You mean commencing with the date of the purchase of the ranch?

A. Until September of 1952.

Q. Thank you. Does the value of that other real property owned exceed the cost of the installations, buildings, and structures, you had contemplated erecting on the Sutro ranch? A. Does——

Mr. Cranston: I think I will object to that as immaterial [894] to the issues in this case.

The Court: Overruled.

The Witness: Would you repeat the question, Mr. Abbott?

Mr. Abbott: The reporter will read it back to you.

The Witness: Thank you.

(The question was read.)

(Testimony of Adolph G. Sutro.)

The Witness: You mean owned before 1952?

Q. (By Mr. Abbott): Let me rephrase the question. I think it can be clarified.

Did the value of all real property owned by you, other than the Sutro ranch, on the date that you bought the ranch exceed the cost of erecting all of the improvements and structures and buildings on the ranch which you contemplated erecting at the time that you purchased it? A. Yes.

Q. Did the value of the common stocks owned by you at the time that you purchased the ranch in 1946 exceed the cost of the improvements which you contemplated erecting on the ranch at the time that you purchased it?

Mr. Cranston: If the court please, the witness has not testified that he owned any common stocks because the objection to the question asking that was sustained. So this question assumes facts not in evidence, and is subject to the same objection as the questions relating to common stocks.

Mr. Abbott: I am attempting to make a record, your [895] Honor. I realize there has not been an answer to it.

The Court: I want you to make your record as secure as you would like to have it, but I don't want you to prolong the inquiry along those lines. Objection sustained.

Mr. Abbott: I have only one or two more questions of this type, your Honor.

Q. (By Mr. Abbott): Did you have in your possession in 1946, at the time you purchased the

(Testimony of Adolph G. Sutro.)

ranch, cash funds equal to the cost of all of the improvements which you contemplated erecting on the ranch?

Mr. Cranston: The same objection, your Honor. It is immaterial.

The Court: Will you read that question, please? That is a little different now.

(Question read.)

Mr. Cranston: I do not see why it would make any difference, your Honor, whether he had cash funds, or borrowed the money, or sold any other property—the means by which the money would be obtained.

The Court: I think I will overrule the objection to that.

The Witness: I had assets sufficient to finance all contemplated improvements at the time of the purchase of the ranch.

Q. (By Mr. Abbott): The question was cash funds, Mr. [896] Sutro. Will you answer it bearing in mind those words?

The Court: Is it the idea to bring it within those condemnation cases where the question of the market value is expressed in terms of available and immediately available dollars? Is that the point?

Mr. Abbott: This question really has a dual purpose, your Honor; the point that the court has last made, the question of ability to do the things which he says he was going to do, and, finally, the question of the effect of inflation upon the sources.

(Testimony of Adolph G. Sutro.)

The question is directed to all of those aspects of the case.

The Court: I think on the former situation, the one that the court has adverted to, the question is proper. On this so-called inflationary aspect, I am not going to take any stock in that at all.

Mr. Abbott: I respect the court's ruling in that regard. I am not arguing that any further.

The Court: Overruled. Now, will you read the question?

(Question read.)

The Witness: By cash funds, you mean bank deposits?

The Court: Specie. He means specie—money.

The Witness: Not gold coin?

The Court: I guess not gold coin.

The Witness: I did not have cash sufficient at that [897] time.

Q. (By Mr. Abbott): Did you have cash plus demand deposits or demand obligations in that amount?

A. My recollection is that within a very small amount, I had cash and quick assets and demand obligations sufficient to finance the entire program.

Q. What do you mean by quick assets?

A. Negotiable securities, currency, bank deposits, or something of that order.

Q. By negotiable securities, are you referring to debenture bonds and other debt type obligations?

(Testimony of Adolph G. Sutro.)

A. Any type of security, which is readily negotiable.

Q. Then limiting the question to demand deposits and cash, were your assets sufficient, those particular types of assets sufficient to purchase them?

A. I do not recall exactly, but it would not be my policy to have that much money, if I have it, idle in the bank.

Q. Now, Mr. Sutro, you testified on direct examination that certain reservoirs were added to the irrigation system described in order to conserve utilities, electric power in particular I believe you referred to. Have you computed how much of a saving would be effected in a year by adding those installations?

A. I do not think I made the statement on which you are basing your premise. [898]

Q. If I misinterpreted your testimony, please correct me.

A. I believe I stated one of the reasons for constructing the day reservoirs.

Q. Have you in fact computed the saving in electricity attributable to that installation in a year?

A. Would you clarify that for me? Have I computed the savings in electricity attributable to that installation in a year? In comparison to what other installation, Mr. Abbott? I cannot compute savings unless I know where we start.

Q. All right. You have testified that certain reservoirs were added to the system.

(Testimony of Adolph G. Sutro.)

A. Yes.

Q. Either in whole or in part motivated by a desire to save electric current?

A. I believe it was in part.

Q. What is the dollar saving in electric current attributable to adding those several reservoirs to the irrigation system?

A. Over what other method?

Q. Over having a system without the reservoirs.

A. I have never even attempted to figure a system without the reservoirs.

Q. It is possible to irrigate directly from the wells, [899] isn't it, Mr. Sutro?

A. If you wish to spend the excessive labor costs which go with irrigating with small streams. In other words—may I just look at my book for a minute? I would like to get a note.

Q. Certainly.

The Witness: Your Honor, may I make a statement subject to correction? I don't like taking the time of the court.

The Court: No, not unless it is an answer. If it is an answer, you may go just as far as you feel is necessary to answer the question, but you have two very good lawyers here, and you can talk to them during the recess if there is anything you want to bring out.

The Witness: Oh, here you are, yes. Now, you said it was possible to—would you have the question repeated?

(Testimony of Adolph G. Sutro.)

Mr. Abbott: The reporter will read it back to you.

The Witness: Thank you.

(The question was read.)

The Witness: Would you tell me, in order to illustrate my point, the output of the well that you contemplate using for comparison?

Q. (By Mr. Abbott): Well, if the information is necessary to your answer, use the actual output of the wells on the property, which you testified to in some detail. [900]

A. Which particular one? The outputs vary.

Q. Let's use them all, where appropriate.

A. As individual wells?

Q. Is there any reason why they can't all be pumped when the agricultural circumstances so warrant?

A. None whatsoever.

Q. Then pumping them all at the same time, that would be the assumption that the question would contain?

A. I see. Well, in that case one irrigator would handle a larger volume of water than the combined output of the wells, and you would then be relegated, in the event of warm dry winds to using the services of only one irrigator instead of having a reserve of water, which you could put on rapidly on high-priced crops. You would have a very minor flow readily available, comparatively minor flow readily available.

Q. Now, is it your testimony that these wells

(Testimony of Adolph G. Sutro.)

acting or operating in combination cannot produce enough water to keep one irrigator busy for a time? I am just endeavoring to clarify it in my own mind.

A. Assuming that the maximum that one irrigator can handle in thorough irrigation is 1,750 gallons per minute, the total output of the wells would not keep him busy, because the wells in total do not produce 1,750 gallons.

Q. Where do you get the 1,750-gallon figure, Mr. [901] Sutro?

A. Discussing it with the farmers in the neighborhood, as to the number of rows one irrigator could handle in vegetables, and about the gallons per minute per row.

Q. That is the maximum figure. Did you get an average figure?

A. No, because I was—the answer is: No.

Q. Did you ask for an average figure?

A. No. I was interested in the maximum.

Q. What is the total capacity of your wells operating in combination?

A. Would you—I am not attempting to split hairs, Mr. Abbott, I assure you, but, after all, you are asking questions and I would like to answer them intelligently. Are you asking me, what is the maximum amount my wells will produce, or are you asking me what is the maximum amount I intend to pump from my wells?

Q. Well, answer both questions, if you will.

A. The first one I cannot answer. The second one I will answer by saying 900 gallons a minute.

(Testimony of Adolph G. Sutro.)

Q. That is the amount——

A. Wait a minute. To save time, I think it is 900 or 925 gallons a minute. If you wish, I will look up the data.

Q. That is the amount you intend to pump?

A. That is correct, yes. [902]

Q. Haven't you computed the maximum production of all the wells?

A. The wells will produce more than I need. Therefore, I have not worried about the maximum production.

Q. Will the wells produce 1,750 gallons per minute?

A. No.

Q. Will the wells plus a sump pit in the basin of Pilgrim produce 1,750 gallons per minute?

A. Would you repeat that? I don't quite follow it.

Q. Well, you are aware of Mr. Ikemi's practice of irrigating the land from a sump pit?

A. Yes.

Q. In the bed of Pilgrim Creek?

A. Yes.

Q. If such a pit were employed in conjunction with the wells, would you have a production of water equal to 1,750 gallons per minute?

A. I do not know what the sump pit in the bottom of Pilgrim Creek would produce. For your information, in computing this irrigation system—may I look at my notes? I think it would help.

The Court: You are now looking at a typewritten statement, Mr. Sutro. Is that just a typewritten statement of your notes?

(Testimony of Adolph G. Sutro.)

The Witness: Yes, your Honor. These are my notes, and I [903] had a young lady type them.

Mr. Abbott: May I inspect the document?

The Witness: You may. (Handing document to counsel.)

Mr. Abbott: Thank you.

The Witness: I had contemplated a draft on any sump in the creek of 225 gallons per minute, Mr. Abbott. I do not know whether it would produce 1,750 gallons.

Q. (By Mr. Abbott): Now, bearing in mind the factors you have discussed, to wit, the cost of electricity and the cost of labor, have you computed the saving in any year attributable to the installation of the reservoirs which are outlined in Exhibits 38 and 39?

A. The only two factors which you were taking into consideration, I take it, is the cost of electricity and the cost of labor.

Q. Are there any other factors?

A. The most important you have overlooked, Mr. Abbott.

Q. Well, I overlook a lot of things. What is the factor I have overlooked?

A. The insurance value protecting high-priced crops by having readily available large quantities of water.

Q. Well, then, not considering the latter factor, and only considering the saving of electricity and labor, have you computed what those savings would be?

(Testimony of Adolph G. Sutro.)

A. I haven't worked them out in detail, no. [904]

Q. Have you worked them out in any fashion?

A. Mentally. It seems so obvious that it seems a waste of time to compute the obvious.

Q. Do you have an approximate figure in mind?

A. No.

Q. Was the land owned by you, or any part of it, leveled by Miss Whelan during the period when she was a tenant on the property?

A. Yes, the customary temporary work was done.

Q. She did level the land?

A. She did some leveling of the land.

Q. How many acres did she level?

A. She ran a float over the lower field.

Q. I don't understand that answer. What did she run over the field?

A. I called it a float. Around 60 acres. There was no real leveling done.

Q. She did that just prior to planting alfalfa, did she not? A. Yes.

Q. And thereafter she grew alfalfa for how long?

A. Well, I don't recall, but it is in the record of this case, I believe.

Q. Well, it was more than two years, was it not?

A. I think—I am unable to testify to that from memory. [905] It is a matter of record, and the record would be more accurate than any memory of mine.

The Court: We will give the reporter a little rest here and recess for about five minutes.

(A short recess.)

(Testimony of Adolph G. Sutro.)

Q. (By Mr. Abbott): Mr. Sutro, did you inquire into the feasibility of using a portable irrigation system on the property?

A. Yes, Mr. Abbott.

Q. Did you get figures for such a system?

A. Yes, Mr. Abbott.

Q. Did you find that to cost more or less than the system which is described in Exhibits 38 and 39?

A. We were unable to complete the figures which we obtained because we did not have all the design assumptions, which I asked you to supply to me on your earlier questions. I have a letter in my file from one of the portable people, with their suggested layout for a part of the ranch. But, as I say, there was a blank spot in there, lack of data for the complete breakdown of costs.

Q. Well, let's point this inquiry to the period subsequent to July of 1952, when the effluent was no longer discharged into Pilgrim.

A. Yes.

Q. As of that time did you inquire into the cost of a [906] portable irrigation system, or at any later time?

A. I do not recall the exact date, but the inquiry regarding the portable system was made, Mr. Abbott, so I cannot intelligently answer your question. If you wish, I will refer to my records and tell you when it was done.

Q. By all means. If the records will assist you, if they will refresh your memory, you are free to inspect them.

The Witness: Shall I do it now, your Honor?

(Testimony of Adolph G. Sutro.)

Mr. Cranston: Do you wish Mr. Sutro to do it now, or to do it during the noon recess?

The Court: Do it later, yes. Let's get along with the interrogation, and then later on you can take your time to look at the records.

Mr. Abbott: Very well. I will reserve that question. I understand that there will be direct examination of Mr. Sutro at a later date, and at that time, if counsel has no objection, I can complete the cross-examination upon this particular point, and Mr. Sutro will have an opportunity to check his records.

The Court: Yes.

Mr. Abbott: I have no more questions at this time.

The Court: Now, if that is the case, I think we will have it now. So look at your records and answer the question.

(The witness referred to certain [907] documents.)

Mr. Abbott: If I may see the documents you are referring to, Mr. Sutro.

(The documents were handed to counsel.)

The Witness: These have no bearing, unless you wish to look at them, Mr. Abbott.

Mr. Abbott: Are you using them in connection with your present testimony?

The Witness: No; no.

Mr. Abbott: Then I won't look at them. To save time, these seem to be fairly lengthy, will they be

(Testimony of Adolph G. Sutro.)

available immediately after the noon recess or during the noon recess, and we can go ahead and you can testify now.

Will that be acceptable, counsel, if I inspect them in detail during the noon period?

Mr. Cranston: It is acceptable to me if it is agreeable with the court.

The Court: I don't know if it is or not until I hear further.

Mr. Abbott: Actually, your Honor, I would prefer to read them now, but I did not want to take the court's time to do so.

The Court: Let me see if I can't eliminate the necessity of another continuance. Are you able now to answer counsel's question?

The Witness: Was it as to—— [908]

The Court: I will have it read.

The Witness: Would you read it, please?

(The record referred to was read by the reporter as follows.)

“Q. Well, let's point this inquiry to the period subsequent to July of 1952, when the effluent was no longer discharged into Pilgrim. A. Yes.

“Q. As of that time did you inquire into the cost of a portable irrigation system, or at any later time?”

The Witness: I did not inquire, no.

The Court: The instruments which you have obtained from your files, which you now have, have they enabled you to answer the question?

(Testimony of Adolph G. Sutro.)

The Witness: Yes, your Honor. They are dated prior to the time mentioned in the question.

The Court: We will mark those for identification, then.

The Clerk: That will be 43, for identification.

(The exhibit referred to was marked Plaintiff's Exhibit No. 43 for identification.)

Q. (By Mr. Abbott): Well, did you secure cost data relative to a portable irrigation system prior to the data last mentioned? A. No.

Q. I call your attention to the second paragraph of the [909] letter dated September 15, 1949, from W. R. Ames Company, addressed to yourself, which is a part of a number of papers now marked Exhibit 43, for identification, and ask you what sprinkler lines are referred to in the first sentence of that second paragraph?

A. Mr. Abbott, I have not read this letter since 1949. May I look at it, if you please?

Q. Certainly.

A. Now, would you repeat the question?

Mr. Abbott: The reporter will read it back.

(Question read.)

The Witness: It is the layout shown in red, according to the first paragraph of the letter.

Q. (By Mr. Abbott): Did you discuss with the gentleman writing this letter a sprinkling system?

A. Certainly.

Q. To be used on what crops?

(Testimony of Adolph G. Sutro.)

A. To be used on any crops which were planted on the land.

The Court: You will have to keep your voice up.

The Witness: Excuse me, your Honor.

Yes. After all, Mr. Abbott, you rotate crops.

You don't plant land continually to one crop.

Q. (By Mr. Abbott): What particular crops did you have in mind that would be suitable for sprinkling, Mr. Sutro? [910]

A. This was one of a series of attempts to mitigate damages and bring the land into production, and I don't particularly recall the crops which were in mind. It could be used for bringing up vegetables. It could be used on alfalfa, although it is rather an expensive way of irrigating it.

Q. Isn't a sprinkling system typically a system designed for commercial flower raising, Mr. Sutro?

A. Not this type of system, Mr. Abbott.

Q. Then what crops in particular, other than those you have mentioned, would be used with the use of that sprinkling system?

A. Would or could?

Q. Well, let's make it could.

A. Well, I imagine that almost any crops except flower crops.

Mr. Abbott: I have no further questions at this time.

The Witness: Is this an exhibit, your Honor?

The Court: It is for identification. It is not an exhibit at this time, but it is to be left with the clerk.

(Testimony of Adolph G. Sutro.)

Mr. Abbott: I will want to read it.

Redirect Examination

By Mr. Cranston:

Q. Mr. Sutro, in answer to one of Mr. Abbott's questions, you stated that Miss Whelan ran a float over the lower field. Can you explain exactly what that involves? [911]

A. Well, it is usually a scraper of some type with what I might say had a long wheel base, so that the blade will fill up the hollows and chop off the top of the high spots and give a fairly level field to irrigate.

Q. Is it a precision instrument, or does it produce a high degree of evenness, or levelness, in the field, if I may use that word?

A. Yes, it is on a—you are referring to making a normal, standard commercial truck crop job?

Q. Yes.

A. Well, then, the first implement you would probably use would be a carry-all, which is an implement suitable for moving rather considerable volumes of dirt. In other words, a float moves a very small amount. So after rough leveling with a carry-all and a bulldozer, you would then put your finish on the job with a float, or what they call a land plane. That is the final implement for leveling.

Q. Was any work done, to your knowledge, by Miss Whelan with a carry-all, or any other implement than the float on this occasion?

(Testimony of Adolph G. Sutro.)

A. Why, no. This was merely a temporary expedient to take out a few of the high spots, to get the water to flow down. It was in no way a job for permanent use.

Q. Now, you were also asked concerning the use of the reservoirs of the dam and the possible savings that might be [912] accomplished, and certain questions were asked concerning the capacity of 1,750 gallons per minute, which was stated to be the maximum that one irrigator could handle. Was your irrigation system designed so as to place upon the land 1,750 gallons per minute, or some other amount?

A. No. The system was designed to handle between five and six thousand gallons of water per minute.

Q. What was the reason for having a capacity of that size?

A. First off, so that in the event of—I dislike using the word “emergencies” that is used so much—but in the event that conditions necessitated immediate application of large quantities of water, why, it would be readily available. If during periods of crop rotation it was desired to plant alfalfa, or some such similar crop, the field could be irrigated at a minimum of labor costs. And, I believe, last—I don’t know whether I mentioned it—that you would also be in a position to employ more than one irrigator; in fact, you would have to be in that position with a ranch that size, employ more than one irrigator at a time, if necessary.

(Testimony of Adolph G. Sutro.)

Q. That is, could one irrigator, working full time, water all of the ranch that you intended to cultivate frequently enough to maintain healthy crops?

A. That question, Mr. Cranston, I would be unable to answer. There are too many variables to allow me to answer [913] it intelligently.

Q. During periods of warm weather, would he be able to do so with, say, hot dry winds?

A. Mr. Cranston, I think I am safe in stating that he would not.

Q. Now, assuming that reservoirs or the dam were not supplied, in addition to the cost of the labor, what other costs would be involved in installing pumps which would pump 1,750 gallons per minute, or any other sum in excess of the 925 gallons per minute which you have stated you intended to pump?

A. I do not believe, Mr. Cranston, I stated 925. I thought I said the capacity that we had figured on pumping the sump in the creek was 925, and, I believe, I said it was between 900 and 925. However, starting in the well itself, going right down to the bottom, you would have a higher lift of water out of the well, because your pumping level goes down in California wells usually in direct ratio to the amount of water which is being pumped. In other words, if your pumping level goes down X-feet when you pump 100 gallons, it will go down 2-X-feet when you pump 200 gallons. So starting at the bottom of the well, I think you would have

(Testimony of Adolph G. Sutro.)

a higher water lift. Then you would be required to buy pumps, more expensive pumps of larger capacity. You would have larger motors, with larger service charges. [914]

Q. By service charge, you mean a charge for electricity?

A. Yes, the stand-by charge. You would be using more horsepower to pump the same volume of water—I mean, more connected horsepower, and would, therefore, not get down as soon into the more favorable power company power charges; and you would also have to have larger pipelines to accommodate the larger flow.

In other words, in one system you operate it to its normal capacity over more or less at a steady rate. This other would be a larger system operated intermittently and would be more expensive.

Q. That is, how many hours a day did you intend to operate the pumps on the system you designed?

A. I might say that in one way you could say continuous operation. However, there is a certain degree of slack allowed for repairs, and such as that, with two of the wells. You are referring to this plan which has been submitted in court?

Q. Yes.

A. On the other well, due to using the power in the shop which is now under construction, to take advantage of the throw-over privileges granted by power companies, the pump is larger than would normally be installed.

(Testimony of Adolph G. Sutro.)

Q. For how long periods would that normally be operated? [915]

A. I think Mr. Abbott has my data sheet, I am sure.

Mr. Abbott: I have only Exhibit 43, for identification, which does not appear to be a data sheet.

The Witness: No, that is not the one. That is the typewritten sheet of mine.

Mr. Cranston: You have the typewritten notes?

Mr. Abbott: Yes, I do. (Handing documents to witness.)

The Witness: Thank you, Mr. Abbott.

Yes, that particular well—would you please read me the question?

(Question read.)

The Witness: Well, that pump was 303 per cent of the capacity, due to the particular conditions under which it functioned. Therefore, it would be operated one-third of the time, a shade over a third.

Q. (By Mr. Cranston): Now, in connection with the questions that were asked you concerning the use of portable irrigation systems, what costs are involved in connection with labor when such a portable irrigation system is used, and how could those be compared, if they can be compared, with the costs involved on the systems you have now set forth? A. I know——

Mr. Abbott: I will object to that because the witness has already testified that he hasn't inquired into the costs of securing estimates of costs of a

(Testimony of Adolph G. Sutro.)

portable system; therefore, [916] he does not appear qualified to answer the question.

Mr. Cranston: Well, I intended this question to show one reason why he didn't go further into the costs.

The Court: I do not understand your observation, Mr. Cranston. I do not understand what you mean by your statement just now.

Mr. Cranston: Well, my statement was that my thought was that one reason he did not go further into the actual cost of the portable system was that there were certain other features which would make it apparently undesirable to use that system, regardless of what the actual installation cost might have been. I was looking at what these other costs might be.

The Court: I suppose the question propounded by Mr. Abbott was anticipatory to something that he expects to ask some of his witnesses. I think I will sustain the objection at this time, and we will see later on whether it has any relevancy.

Q. (By Mr. Cranston): Mr. Sutro, in the early part of your cross-examination you were asked concerning the pumping of the effluent, and whether part of your intention at any time was to pump the effluent. Can you state to what extent you desired to pump the effluent at any time during the period from the time you purchased the property up until the present time? [917]

A. Yes. I believe I testified in the early part of this hearing that it was not the ambition of my life

(Testimony of Adolph G. Sutro.)

to live on a sewage farm, and also that the closing of Camp Pendleton or abandonment of Camp Pendleton was believed to be imminent. The pumping of the sewage or effluent would have been making a virtue of necessity, which was not at all attractive.

Q. Did you at any time desire to have the discharge of sewage continued?

A. I recall of no occasion.

Q. You were asked concerning the reason you had not installed or commenced to install a system at any particular date. Can you tell the court what information you would have had to have in order to install any particular system at any particular time? That is, what factors would you have had to take into consideration before you could commence work on any system?

A. Are you referring to the questions of Mr. Abbott this morning, which I was unable to answer?

Q. Yes, in which you asked him to state certain additional assumptions so that you could answer the questions. What assumptions or what additional information would be necessary for you to answer such a question?

A. Well, the first information—the first assumption would have to be the date of installation. The second assumption [918] would have to be the Navy plan which was current. The third assumption would have to be how long a time would elapse between the date under discussion until the then cur-

(Testimony of Adolph G. Sutro.)

rent Navy plan was put into operation, in order that you could intelligently calculate the prospective life of a temporary installation.

Q. Did you at any time during this period have all this data available?

A. No. If we had had the data available, the system would have been installed immediately. We attempted time after time, and designed and worked up data sheets, and made inquiries from pump companies on the basis of the information we were able to extract from the Navy as to their intention, but we were never warranted in actually putting the pump in until we knew how long—until we were sure we were permitted to use it.

Q. During this period did the Navy have permission to dredge the channel of Pilgrim Creek?

A. The Navy——

Mr. Abbott: Objection. That question is far too general. The crux of the objection, your Honor, is permission from whom?

The Court: Yes, there were several along there. I do not believe we are going into all of these various property rights that existed along Pilgrim Creek from the outfall in [919] Camp Pendleton down to the confluence with other streams. I am not going into that. Objection sustained.

Q. (By Mr. Abbott): I would limit the question then: Did the Navy have permission from you to dredge the portion of Pilgrim Creek lying within your boundaries during any portion of this period?

A. Yes; and it is a matter of record in this case.

(Testimony of Adolph G. Sutro.)

Q. If the Navy had availed itself of that privilege, would that have had any effect upon any diversion works which you might have previously installed?

A. It would have affected any well we would have put in the creek. It would have affected any diversion works which were in the creek.

The Court: It could not have been effective, though, Mr. Sutro, unless the other property owners along the stream were similarly disposed, could it?

The Witness: I do not understand your question, your Honor.

The Court: I thought it was clear.

The Witness: You said similarly disposed. Disposed to what?

The Court: If you don't understand the question, just say so, and I will clarify it.

The Witness: Excuse me, your Honor.

The Court: Now, there were other property owners who [920] either had or claimed to have an interest in the bed of the stream?

The Witness: Yes.

The Court: You were only one of such?

The Witness: Yes.

The Court: In order to carry out the program of irrigation, an irrigation system, it would be necessary, would it not, to have the others who claimed property rights in the stream to waive whatever rights they asserted and have the Navy be able to give an effective permission, so that you could function according to your desires? Does that clarify it?

(Testimony of Adolph G. Sutro.)

The Witness: If the bed of the stream means the water——

The Court: It means everything in it, when the water is flowing.

The Witness: I know of other claims to the water of the creek.

The Court: Oh, I didn't understand the way you meant your answer. Very well. We will not go into that in this case.

Mr. Cranston: I believe I have no further questions, your Honor.

Mr. Abbott: We have a few, your Honor.

The Court: I think we had better have them, so as to finish with this witness, so that you can go ahead and start [921] with your other witness at 2:00 o'clock.

Recross-Examination

By Mr. Abbott:

Q. Mr. Sutro, you testified that at no time did you desire to have the sewage or effluent flowing through your property. Isn't it a fact that on September 4, 1946, you wrote a letter, now in evidence in this cause as Exhibit A of the government, and quoted at pages 286 and 287 of the record of the first hearing, in which you said, in part:

"I am disposed to make a most reasonable settlement of my claims against the Government, and to convert to the farming program outlined above, if I am assured I will be allowed to continue to

(Testimony of Adolph G. Sutro.)

receive the entire augmented flow of Pilgrim Creek."

Do you recall writing such a letter which provided in part the part which I have quoted?

A. I certainly do.

Q. Now, you testified to having considerable uncertainty as a result of a Navy change of plan, which affected the installation of the irrigation system. Would that uncertainty have affected in any way the layout of the pipes in the fields, Mr. Sutro?

A. Yes.

Q. In what way? [922]

A. It would determine where you were going to connect with your source of water.

Q. In other words, the only effect upon the field layout is an effect upon the connection point with the water source; is that the case?

A. Offhand, that is all that occurs to me.

Q. Would it have any effect upon the reservoirs which you contemplated and the dam which you contemplated?

A. No.

Q. Is there any reason why a diversion point could not be created, as your predecessors in title did, subject to removal in the event that the Navy plan so required?

A. At whose expense?

Q. The question is, is there any reason why that could not have been done, Mr. Sutro?

A. No, it could have been done.

Q. And what would be the expense of removing the diversion point, if that should become necessary?

(Testimony of Adolph G. Sutro.)

A. Well, once again, what size pumps were involved? How long would their useful life be before they were discarded?

Q. Are the pumps located within the bed of Pilgrim when the augmented flow is being used in the irrigation system?

A. Are you assuming that the augmented flow would come [923] down Pilgrim Creek, and on what do you base that? I mean—I am not asking you a question, Mr. Abbott. Please excuse me. I mean, am I to assume that the augmented flow would come down Pilgrim Creek?

Q. During the period when there was an augmented flow, could it not have been reached by diversion, and that diversion works removed if occasion would arise for their removal?

A. Yes, Mr. Abbott, it could.

Q. Is there anything in the Navy's plan, or the Navy's change of plans, as you knew them, which would have prevented you from drilling wells to tap the underground source of water?

A. I believe we did drill wells, Mr. Abbott.

Q. Well, is there anything in the Navy's plan that would have prevented you from drilling those wells in 1946?

A. No; I presume we could have drilled wells on that ranch at any time the idea struck me.

Q. Now, at the time that you gave the Navy permission to dredge in Pilgrim Creek, were you aware of the possibility that that dredging might interfere with a diversionary effort? A. Yes.

(Testimony of Adolph G. Sutro.)

Q. From the time that you had actually drilled the wells in 1950, was there anything in the Navy's conduct which prevented you from harnessing those wells to the particular [924] irrigation systems that are described in Exhibits 38 and 39? A. Yes.

Q. What?

A. The—just to get my chronology straight, when was this suit filed, so that I don't—

Q. In April of 1950.

A. April of 1950, and your question is, then, as I understand it, was there anything after December 16, 1950—

The Court: We will have the question read, Mr. Sutro.

The Witness: Excuse me.

(The record referred to was read by the reporter as follows.)

“Q. From the time that you had actually drilled the wells in 1950, was there anything in the Navy's conduct which prevented you from harnessing those wells to the particular irrigation systems that I described in Exhibits 38 and 39? A. Yes.

“Q. What?”

The Witness: The statements in Judge Weinberger's court by Mr. McCall that it was a discretionary act; the refusal of Mr. McCall twice in open court to give us assurance that the pollution would cease; the failure to answer Mr. Cranston's letter when we were trying to save a growing [925] alfalfa crop—the crop was there, it was a beautiful crop,

(Testimony of Adolph G. Sutro.)

we were attempting to save it, and the letter remained unanswered; the instructions of Mr. McCall to Colonel Robertson when the Marine Corps was willing, in fact, the Marine Corps had drawn up an agreement to cease pollution; and I believe other statements by Mr. McCall in open court in which he refused to give us that assurance.

Q. (By Mr. Abbott): Mr. Sutro, what did you contemplate that Mr. McCall or the government could possibly do to interfere with your use of the water from the wells drilled in 1950 for the alfalfa, which was suffering from lack of water, as you say, or for any other purposes?

A. Would you just—would you mind breaking that question up into separate parts?

Q. Certainly. What action by Mr. McCall or by the government could have interfered with the use of the water from the wells in irrigating the alfalfa?

A. Nothing. That was a straight question of economics, and it was covered rather completely in my letter of March 30th, I believe, 1950, a part of which was read in court yesterday, or the day before. It was a question of: Would it have paid?

Q. Why wouldn't it have paid, Mr. Sutro?

A. May I refer to that letter?

Mr. Abbott: Yes, I would like to see it. I don't know [926] the letter to which you refer.

The Court: Is that the letter to Mr. Deutz?

The Witness: Yes.

Mr. Cranston: It is in the transcript.

Mr. Abbott: Do you have the page?

(Testimony of Adolph G. Sutro.)

The Court: I don't know as the whole of it was read.

Mr. Cranston: It is in the transcript at page 354, I believe, Mr. Sutro.

The Court: The court does not have a copy of that transcript. I am speaking from recollection. It may be in the clerk's office. If it is, Mr. Clerk, will you bring it in this afternoon?

The Clerk: Yes, your Honor. I will try to ascertain if we have everything.

The Court: Counsel thinks it was copied in in extenso.

The Witness: May I read—shall I read this, Mr. Abbott?

Mr. Abbott: Well, I am referring to it at the present time.

Yes, you may read the portion that you feel constitutes an answer to the last question, Mr. Sutro.

The Witness: Would you be so kind as to read the last question?

(The record was read.)

The Witness: A large part of this was read yesterday and [927] is in the record, so I will not read it a second time, if that is satisfactory.

The Court: Well, unless Mr. Abbott wants an answer to his question.

Mr. Abbott: The witness has indicated, your Honor, that the best way he can answer is to point to a particular provision of the letter. If he can readily do that, that is satisfactory.

(Testimony of Adolph G. Sutro.)

The Witness (Reading): "Of course, if construction under their latest scheme is started by the Government and if it is not abandoned when half completed, I may be able to rent a pump to put in the new well. I may be able to have the power company extend their lines in time to prevent losing the alfalfa crop if I would obligate myself for a three-year contract for power which may never be used and I may be able to obtain pipe and build a temporary distribution system and a reservoir for the water in order to save the alfalfa and mitigate damages."

Q. (By Mr. Abbott): Then you contemplated that all of those things were possible at that time?

A. The pump could have been installed.

Q. And it could be used for its entire useful life with the wells and with the irrigation system that you have described in court, and illustrated in Exhibits 38 and 39, for an indefinite period, regardless of the [928] conduct of the government; isn't that a fact?

A. Wait until I break that down. The pump—is your question: The pump could have been installed in the well and the entire system could have been constructed and used for an indefinite period of time? First of all, the entire system could not have been constructed in time to save the alfalfa crop.

Let's see. Yes, the system could have been installed, if that was going to be the system.

Q. And nothing that the government would do, or could do, short of condemnation of your land,

(Testimony of Adolph G. Sutro.)

would interfere with the operation of that system for an indefinite period; isn't that the fact, Mr. Sutro?

A. What is your definition of interfering with the operation?

Q. You would have a serviceable irrigation system, which could be used year in and year out, irrespective of the conduct of the government; isn't that a fact?

A. I would have an irrigation system, but I would be unable to keep anyone on the ranch while the water remained polluted. I would be unable to keep equipment on the ranch.

Q. Are you presently drinking bottled water in your own residence? A. Do I what?

Q. Are you presently drinking bottled water in your [929] own residence?

A. Yes, I do. I haul it from my own ranch. I prefer it to the bottled water the bottled water people sell, so for my own use I bring water from my own ranch for drinking water.

Mr. Abbott: I have no further questions.

Mr. Cranston: I do have one more.

Redirect Examination

By Mr. Cranston:

Q. The purpose of any irrigation system is to supply water to the land; is that correct?

A. That is correct.

The Court: Isn't that a self-evident matter?

Mr. Cranston: That is preliminary, your Honor.

(Testimony of Adolph G. Sutro.)

The Court: Very well.

Q. (By Mr. Cranston): The crops which can be grown would vary with the nature of the water which was delivered, whether it was pure or polluted; is that correct? A. Yes.

Q. The system that you would install in case of polluted water would be the same or different from the system you would install for the use of pure water?

A. No, the system we would install for the use of polluted water would be cheaper than the system we would install for pure water. [930]

Q. But that system could not thereafter be used for the purposes for which a pure water system would have been used; is that correct?

A. Not as satisfactorily, no.

Q. At any time during this period did you expect that the pollution would continue for an indefinite period in the future? A. No.

Mr. Cranston: That is all.

Recross-Examination

By Mr. Abbott:

Q. In what way would the system that would be used for polluted water be cheaper than the system used for pure water?

A. You would not need to put your laterals so close together, because using the polluted water, you would figure on a forage crop where large volumes of water could be applied quickly. In vegetable crops in that neighborhood they usually

(Testimony of Adolph G. Sutro.)

irrigate by the furrow system, and the furrows, due to the smaller amount of water applied, are much shorter. For that reason laterals in a vegetable field would be closer together, or should be, for a satisfactory arrangement than in an alfalfa field.

Q. Of course, if the vegetables being grown were for seed with polluted water, the system would be the same, wouldn't it? [931]

A. If you could grow vegetables for seed in that district successfully.

Q. And if you contemplated a termination of the pollution, it would have been feasible, would it not, to have put in the scheme contemplated for using it for all of the crops which could be grown with polluted water?

A. You mean, if I had contemplated an immediate or reasonably soon termination of the pollution, that you would then have put in the system more particularly suited for vegetables, and use it in the interim for alfalfa crops?

Q. Yes. That would be the fact, would it not?

A. Yes, if I had so contemplated.

Q. Didn't you so testify a moment ago?

A. I do not recall it. Are you referring to the contemplation regarding the cessation of the pollution?

Mr. Abbott: I have no further questions.

Mr. Cranston: Do you wish to explain your last answer?

The Witness: I have no recollection that I contemplated the immediate cessation of the pollution.

The Court: The record will show what he said, gentlemen.

Mr. Cranston: Yes. That is all.

The Court: 2:00 o'clock, gentlemen.

(Whereupon, at 12:20 o'clock p.m., a recess was taken until 2:00 o'clock p.m. of the same date.) [932]

Tuesday, March 2, 1954—2:00 P.M.

The Court: Proceed, gentlemen.

Mr. Cranston: Mr. Anderson, please.

THOMAS E. ANDERSON

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: Thomas E. Anderson.

Direct Examination

By Mr. Cranston:

Q. Your name is Thomas Anderson?

A. Thomas E. Anderson.

Q. What is your occupation or profession?

A. I am a real estate broker in land only.

Q. Can you state what your experience has been in that connection? That is, where did you attend school?

Q. Well, I attended school in Kearney, Nebraska. I graduated from high school in Kearney,

(Testimony of Thomas E. Anderson.)

Nebraska. I attended the—I graduated from business college in Des Moines, Iowa.

Q. Where did you locate after that?

A. In Burley, Idaho.

Q. And when did you come to California?

A. In 1916.

Q. Where did you locate at that time? [933]

A. Imperial Valley.

Q. How long did you remain in the Imperial Valley? A. We moved to San Diego in 1920.

Q. And have you lived in San Diego since that time? A. Yes, sir.

Q. What has been your occupation since that time?

A. Real estate broker; farm lands only.

Q. Have you at any time owned any property in San Diego County?

A. I have; still own property.

Q. What type of property? A. Land.

Q. Is it city land or country land?

A. Country land.

Q. Have you done appraisal work in connection with ranch properties? A. I have.

Q. Has that involved ranch properties in San Diego County? A. That is correct.

Q. Over what period of time did you engage in such appraisals? A. About 34 years.

Q. During that time have you appraised for agencies of the United States Government? [934]

A. I have.

Q. Have you appraised for individual persons?

(Testimony of Thomas E. Anderson.)

A. I have.

Q. Have you appraised for banks?

A. I have.

Q. Could you name one or two banks you have appraised for?

A. Well, mostly, I presume, the Security Bank of San Diego.

Q. Have you appraised for condemnation actions? A. Yes, sir.

Q. Have you testified in various actions which have been tried in the Superior and the Federal courts? A. I have.

Q. Have you examined the property which Mr. Sutro owns, which is located near Oceanside in San Diego County? A. I have.

Q. Have you examined the soil characteristics of that property? A. I have.

Q. Will you state what you observed in that connection?

A. Well, my opinion of the soil, the predominating is Hanford sandy loam and Greenfield sandy loam.

Q. What is the character of that soil with [935] reference to the growing of vegetables?

A. It is considered one of the very best.

Q. Have you observed the climatic conditions of that area, and are you familiar with them?

A. It is a very high-class district in there. The cultivation is, I would say.

Q. During the time that you have lived in San Diego County, and during the time that you have examined this property, have you been familiar with rental values in this vicinity?

(Testimony of Thomas E. Anderson.)

A. Yes, I have had occasion to—in fact, I have had occasion to adjust some of them.

Q. Now, did you note on Mr. Sutro's property areas which have been delineated on Plaintiff's Exhibit 32, and marked thereon as Field No. 11, Field No. 4, Field No. 7, Field No. 5, and Field No. 6?

A. Yes, I have gone over all of them.

Q. In your opinion, what would be the rental value of those properties during the years from 1946 to the present time, assuming that the water supply for those properties had not been polluted or contaminated?

A. Well, I based my real valuation on this entire appraisal on the fact of the cheap water conditions, and in comparison with other water tables in the balance of the valley, and the cost of operation in the valley land, and [936] the cost of operation on this particular place, as given to me.

Q. And what is your opinion of the rental value during the period to which I have referred?

A. I want to make myself very clear on this. I am basing it entirely upon the cost of water. I have based it on the 90-some acres in there that they have given me at \$100 per acre, and the other portion at \$75 per acre.

Q. Well, so far we have only referred to the portions I have referred to——

A. To the 90-some acres, that is correct.

Q. ——as the 97 acres. Then is it your opinion that all of the 97-acre area within all the fields I have mentioned, the rental value for each acre from

(Testimony of Thomas E. Anderson.)

1946 would be \$100 per acre for each rental year?

A. That is correct.

Q. Now, calling your attention to the areas which have been marked on this map as Fields Nos. 10, 9, 8, 3, 2, and 1. Have you examined those areas also?

A. I have; which is approximately, I believe, 50 acres.

Q. Yes. In your opinion, what was the rental value of that area, assuming an unpolluted water supply, from the years 1950 to the present time, that is, beginning with the year 1951?

A. \$75 a year. [937]

Mr. Weymann: I didn't get that answer.

The Witness: \$75 a year.

Q. (By Mr. Cranston): Now, assuming, Mr. Anderson, that the land to which you have referred did not have a pure water supply, what would be the value of the first group of fields, the 97-odd acres?

Mr. Abbott: I will object to that, unless counsel defines "pure water." As we found in the first trial, that is a very relative term, and there are varying degrees of impurity of water, and the court has only found a particular type or defined degree of impurity here.

The Court: I believe the witness is entitled to have defined the type of water that is characterized as pure water.

Q. (By Mr. Cranston): Assuming, Mr. Anderson, there was either no water supply or a supply

(Testimony of Thomas E. Anderson.)

which was polluted with sewage effluent, so that it could not be used for the growing of human edible crops——

Mr. Weymann: Just a moment. We object to that question as being compound and assuming a fact not in evidence. There is no evidence here that there has been no water supply.

The Court: It is a compound question, I think.

Q. (By Mr. Cranston): I will rephrase it this way, then: Assuming that the only water supply had been polluted with sewage, so that it was not available and could not be used for the growing of human edible crops, what would be the rental [938] value of property under those conditions?

A. Well, it could have been rented for dry farming.

Q. And what would be the rental value of the property for dry farming?

A. Well, it is considered in San Diego County that barley is one of the most profitable crops that you can raise dry farming, because it is an economical crop to put in, and the prices are fair, and I think most of our dry farming is principally barley in San Diego County.

Q. And what would have been the rental, the reasonable rental value of the property for such purposes?

A. Well, that has always been based upon a share basis. I don't know a parcel of land in San Diego County that was ever rented on a cash basis; usually

(Testimony of Thomas E. Anderson.)

one-fourth to the owner, and three-fourths to the farmer.

Q. In your last answers were you referring to land used for dry farming?

A. That is correct.

Q. What would be the estimated yield, in your opinion, from such land, if it had been rented on a dry farm basis?

A. Well, the average yield, dry farm yield, in San Diego County varies from six sacks to 15 sacks to the acre, and it depends entirely upon the ground. This is classified as A-1 soil, and I gave it—I would put it at the top peak, 15 sacks to the [939] acre.

Q. And what would be the average price, then, which this barley could have been sold for during this period, upon which to compute the monetary return from 15 sacks per acre?

A. Well, I took that up with the Poultry Association, which are perhaps the largest buyers in San Diego County of all grains, and they estimated the average price from '46 to '53, was \$2.90 per hundred.

Q. Now, would the price—the rental value of the second group of fields, constituting approximately 50 acres, if used for dry farming be the same, or would it be different?

A. It would be on the same basis entirely.

Q. Would the yield be the same?

A. I would say exactly the same.

Q. And, of course, the price would be the same?

(Testimony of Thomas E. Anderson.)

A. Would be the same.

Q. Did you note the wells which were on the property during the course of your examination?

A. Yes, I did.

Q. You may cross-examine.

Cross-Examination

By Mr. Weymann:

Q. Mr. Anderson, are you a member of any professional organizations?

A. San Diego Realty Board.

Q. Any others? [940]

A. Did you mean clubs?

Q. No, professional organizations.

A. No, the San Diego Realty Board.

Q. How long have you been a member of that?

A. Oh, I think ever since it has been organized in San Diego.

Q. You appraised ranch properties for quite a few number of years. Will you tell us some of the properties that you appraised?

A. Yes. No. 1, I can go back to the appraisal of the Lawrence Oliver tract, which was condemned by the government, of a thousand and some acres, on which I appraised the property and was their chief witness in the appraisal there.

Q. When was that?

A. Oh, you have asked me an offhand question. I cannot give you the exact date.

Q. Well, approximately. I am not trying to pin you down.

(Testimony of Thomas E. Anderson.)

A. Oh, I would say it goes back at least to 12 years ago.

Q. Twelve years ago. And what crop was raised on that ranch?

A. Oh, he had a hog ranch on it, and a dairy ranch.

Q. A hog and a dairy ranch. Did he raise any edible crops on it? [941]

A. No; grain mostly, and dry farming, mostly.

Q. Dry farming, mostly?

A. That is correct.

Q. No alfalfa? A. No.

Q. Or beans? A. No.

Q. Where was that located?

A. Well, that would be in the Camp Kearney district, now, where Miramar is located.

Q. Now, what other ranch properties have you appraised?

A. Well, I have appraised the Winston property in the San Luis Rey Valley, which is a tributary to this property that I am putting an appraisal on today.

Q. And how many acres in that?

A. 440 acres.

Q. How long ago did you appraise that?

A. Oh, I would say about four years ago; maybe five.

Q. And what was raised on that?

A. Well, they had 111 acres in vegetables.

Q. Yes?

A. Perhaps about—offhand, I would say around

(Testimony of Thomas E. Anderson.)

100 acres in dry farming; the balance, pasture.

Q. The balance in pasture. Any other properties?

A. Yes, plenty of them I guess. Perhaps I had better [942] refresh my memory. Some of them go back quite a ways. One property I appraised here for the Los Angeles Furniture Company, Roger Goodin. At that time his property was, oh, a thousand and some acres, which adjoins the Fenita ranch, which was a Spanish grant, and that was a thousand, or, I believe, 1040 acres. And I appraised the Harris property.

Q. Before we leave the Goodin ranch, was that a subdivision property?

A. No; no, it was not. It was a ranch. They still own it, and they run a few head of cattle on it.

The Court: Where is that, Mr. Anderson?

The Witness: The Fenita is—do you know where Santee is?

The Court: Yes.

The Witness: Okay. It is about three and one-half miles this side of Santee, and about four miles up Sycamore Canyon. It just about adjoins the Fenita. They have large holdings in there. It would be about four miles—you go in by way of Pala way, or you can go in the other way.

Q. (By Mr. Weymann): And the Goodin ranch was a cattle ranch, you say?

A. That is right.

Q. How long ago did you appraise that?

A. Oh, I would say six or seven years ago, that one.

(Testimony of Thomas E. Anderson.)

Q. Any others that you wish to refer to? [943]

A. Well, let's see. I am trying to get those that are close in there. The Harris ranch, at that time, an 1800-acre ranch. That is up on the San Luis Rey River, but it is up about six or seven miles west of the Henshaw Dam. That is principally a cattle ranch.

Q. How far is that from the subject property, would you say?

A. From this property here?

Q. Yes. A. At least 35 miles, I would say.

Q. Is that in San Diego County?

A. Yes, sir.

Q. And when did you appraise that?

A. Oh, about three years ago, I would say.

Q. And you mentioned that one of these, the Oliver property I think, you appraised for condemnation purposes? A. That is right.

Q. How about the Winston, and the Goodin, and the Harris property?

A. That was appraised for estate purposes.

Q. For estate purposes. And that is true of the other three?

A. Yes, that is quite true, except the Harris ranch, and that was appraised for a selling value.

Q. No, in connection with your investigation of sales, [944] market value of property, rental value of property, just what investigation did you make for the purpose of testifying here?

(Testimony of Thomas E. Anderson.)

A. Well, you mean on this particular ranch?

Q. Yes, the subject property.

A. Of course, I know most of those ranches in that entire valley, and I double-checked with owners of land, I checked with property virtually adjoining this property, except where Foss Lake divides it, and I checked in the Vista Irrigation District, where they are raising celery, and the cost of water, and I checked in the Fallbrook district, and also down as far as the Chula Vista section, which is perhaps one of the best celery sections in Southern California.

Q. Now, are you familiar with a sale from A. M. Dunn to Mr. Murdy in 1950?

A. You mean on this particular piece of property?

Q. No, on property in the San Desquito River Valley.

A. Oh, yes, I know the property very well. In fact, I was interested in a part of the sale of it.

Q. Yes. When was this property sold?

A. This one particular piece was sold three years ago.

Q. Three years ago? A. That's right.

Q. Do you know what the acreage was?

A. Well, it was sold in different parcels. There was one parcel of 300 and some acres. That was sold before the [945] balance of the ranch. Oh, I think there was about 400 and some acres left in the balance of the Dunn property in there. There were two different sales made on it.

(Testimony of Thomas E. Anderson.)

Q. Are you familiar with the Caroline Spalding sale?
A. No, I am not.

Q. That is a sale made in 1948. You are not familiar with that. Are you familiar with a sale made by Morris Glick to Ed and Robert Panke?

A. I am not familiar with it. I probably know the land, but not at that——

Q. It is at the intersection of Pala Road and Highway 395.

Q. Highway 395 and——

A. The Pala Road.

Q. Pala Road. Do you know that?

A. I know the district quite well.

Q. But you are not familiar with that?

A. No, I am not.

Q. Are you familiar with the sale by Edgar S. Dulin to Malcolm P. Cameron?

A. Well, I am familiar with the Dulin ranch; very familiar with it.

Q. But you are not familiar with the sale or the terms?

A. No. In fact, I didn't even know he had sold any [946] portion of it.

Q. Were you on that ranch? Did you examine that?
A. I have been all over it.

Q. Never for the purpose of ascertaining its market value, though, were you?

A. Well, I had it listed for sale at one time.

Q. How long ago did you have it listed for sale?

A. That goes back to just before Mr. Dulin bought the property, but he has had it for quite a few years.

(Testimony of Thomas E. Anderson.)

Q. Are you familiar with a sale by Lillian Josephine Dawson to Theodore W. Wackerman?

A. I am not.

Q. Are you familiar with a sale by Wackerman to Anatole M. Joseph? A. I am not.

Q. Are you familiar with the sale or the purchase of Mr. Zanhiser's property?

A. I am not.

Q. Do you know where the Zanhiser property is located? A. I do not.

Q. Would it help you to identify it if you were told that that was the adjoining property to the Sutro property?

A. No, I wouldn't even know it by that name at all.

Q. Did you investigate the methods of farming operations on any of the adjoining ranches? [947]

A. Well, I have been quite familiar with them practically for years, with the operation.

Q. Am I to understand, then, you depended on your familiarity over a course of years?

A. Well, I don't know how you are giving me that question. Do I know how the ranches are operated up there or——

Mr. Weymann: Will you read the question, please.

(The question was read.)

The Witness: The fact is that I know quite a few of the ranchers up in there, and I know their operations in vegetable raising, and so forth. If

(Testimony of Thomas E. Anderson.)

you mean that, why, sure, I am quite familiar with it.

Q. Are you familiar with the method of operation on the Zanhiser ranch? A. No, I am not.

Q. You made no investigation, then, I take it?

A. I am not familiar with it.

Q. Are you familiar with the sale made by George W. Beermaker, Inc., a sale made by George W. Beermaker, Inc., to Elias Zanhiser?

Mr. Cranston: When was that sale made, Mr. Weymann?

Mr. Weymann: That sale was made in 1945.

The Witness: The valley stuff in there, really, I am very frank in telling you—the valley land has gone up so terrifically high, that I have really kept away from that [948] district entirely, because I have been busy in the other end of the valley more than I have been in this end, because they are talking subdivisions, and everything else, in this end of the valley, which I am not interested in.

Q. (By Mr. Weymann): I see. You have kept away from this end. When you say “of the valley,” now let’s clear that up.

A. The San Luis Rey Valley is quite a large, extensive valley.

Q. Well, then, did you make any investigation of leases?

A. Yes, I have. I have talked with Mr. Stokes, who has one of the adjoining places, and he raises celery. In fact, they have over 200 and some acres in there that they operate. And I have talked with

(Testimony of Thomas E. Anderson.)

Davies, who farms 40 acres, practically all in celery and other vegetables.

Q. Pardon me. I thought you were finished. Where is the Davies property?

A. Well, it is on virtually the same road going up to the Sutro property. You might say in that district. It is in the valley, nevertheless.

Q. Yes. Any others?

A. Yes. I have talked with—well, in fact, I covered that entire territory pretty well. But these were the important things: I took into consideration more or less [949] the adjoining property, and also I took into consideration the Winston property, which is one of the largest ranches in that vicinity in the way of vegetables, and, probably, to me, gave me one of my best ideas as to the cost of water and operation.

Q. You did not consider the Zanhiser property as a significant thing?

A. No, I can't even locate the property.

Q. You can't even locate the property?

A. Not by that name.

Q. Are you familiar with a lease made by Dr. Wilbur M. Myers to the Atlas Company?

A. I am not.

Mr. Cranston: When was that lease made?

Mr. Weymann: That lease was made in July, of 1953.

Q. (By Mr. Weymann): Are you familiar with a lease made by Mr. Panke of a part of the Panke ranch to Ed Tribolet, 150 acres?

(Testimony of Thomas E. Anderson.)

A. No, I am not.

Q. Are you familiar with a lease by Mr. Panke to Jones and Cavanagh?

A. I am familiar with it. I know the property, and that's all.

Q. What was that?

A. I know the property, but I didn't know anything [950] about the lease whatsoever.

Q. You did not investigate that lease?

A. No, I did not.

Mr. Cranston: When was that lease made?

Mr. Weymann: That lease was made in 1952.

Q. (By Mr. Weymann): In order to save time, would your answer be the same to all of the leases made by the Panke interests, a part of their interests?

A. Yes. I am not familiar with their leases at all. They operate them themselves.

Q. Are you familiar with a lease made by Mr. Cameron to Jack Carrillo in 1952?

A. No, sir.

Q. Did you investigate any of the Camp Pendleton agricultural leases?

A. No, sir, because I don't know what that covers now, you understand. I covered that entire district down below there, and talked with probably eight to ten different landowners, and the principal ones I took were the larger holdings, like the Stokes and the Winston properties.

Q. Where is the Stokes property located?

A. How is that?

(Testimony of Thomas E. Anderson.)

Q. Where is the Stokes property located?

A. It is right below—adjoins Foss Lake, right below this property. [951]

Q. What was raised on that property?

A. Principally celery and—well, they had celery, and chili beans, and, of course, when I was over it the first time they had a great deal of cabbage there. But they have about 200 acres there that is operated.

Q. What was the source of water supply for that?

A. Wells.

Q. Wells on the property. Any dry farming conducted on that land?

A. Not that I know of.

Q. What was raised on the Davies property?

A. Vegetables entirely.

Q. How many acres?

A. Forty.

Q. And where was that property located with reference to the subject property?

A. Well, it would be south and west of this property.

Q. How far?

A. Oh, I would say two miles; maybe two and a half.

Q. What was the source of the water supply there?

A. Well water.

Q. Well water. And the Winston property, where is that located?

A. Well, that would be above the Davies property, I would say about four miles. [952]

Q. Four miles from the subject property?

A. From the Davies property, on Highway 76.

Q. And how far would that bring it from the

(Testimony of Thomas E. Anderson.)

subject property, from the Sutro property?

A. Oh, I don't know. Offhand, I would say probably four or five miles.

The Court: Is that property up the San Luis Rey Valley?

A. Yes. It is right on the river.

Q. (By Mr. Weymann): Do you know of a lease made by Camp Pendleton to the Beggs Brothers Fruit Company?

A. I do not.

Q. Do you know of a lease made by Camp Pendleton to Pablo Castro?

A. I do not. I don't even know the property. I don't even know where the property is located.

Q. I see.

A. Camp Pendleton is pretty big country.

Q. A part of it is in the Valley, isn't it?

A. Yes. A lot of it is in the Santa Margarita Valley, too, which is the largest of all.

Q. Now, I believe you testified on direct examination that the rental value of the 97 acres included in fields Nos. 11, 4, 7, 5, and 6 was, in your opinion, worth \$100 an acre?

A. That is right.

Q. Per annum. And that the remaining portion was [953] worth \$75 an acre?

A. That's right.

Q. That is assuming that the water is unpolluted. Was that estimate based on what you tell us is your general knowledge of the district, or on an investigation of leases of comparable properties?

A. I based it entirely upon the leases of other properties, less the cost of the water. I based my

(Testimony of Thomas E. Anderson.)

value of \$100 an acre upon the water that can be delivered on this property, at a much lesser price,

Q. Investigation of other properties as to which you have testified here? A. Pardon?

Q. On the other properties as to which you have testified here, which you have examined?

The Court: You had better clarify that, Mr. Weymann.

Mr. Weymann: I will withdraw the question as I originally framed it.

Q. (By Mr. Weymann): That opinion, Mr. Anderson, is that based on your investigation of these other properties to which you have referred?

A. That is right.

Q. And if a further investigation of still other properties, some of which I have called to your attention, would disclose other leases and other sales, would that have [954] any effect on your opinion?

A. If they had the cheap water that this place can deliver, it certainly would change my views.

Q. What has been your experience as to the relation between the rental value of property, that is, as an over-all figure, between the rental value of property, farm property of this kind, and its market value?

Mr. Cranston: Is that limited, Mr. Weymann, to land in this area?

Mr. Weymann: To land in this area, yes.

The Witness: You mean as to the value of the land?

(Testimony of Thomas E. Anderson.)

Q. (By Mr. Weymann): As to the value of the land.

A. Well, I don't think you could make any comparison on that in the San Luis Rey Valley, because they hold their land there from \$1,500 an acre up, and no matter what rental you get out of it, it is pretty hard to determine the right kind of a profit on a rental basis, because it will sell for more than what the income would justify.

Q. And is that true throughout that valley?

A. I think it is practically true all through Southern California.

Q. Well, I won't argue with you on that. Now, your valuations were based on certain figures, \$100 for 97 acres, and \$75 for the remaining part of Fields 11, 4, 7, 5 and 6, and those rental values, in your opinion, were they consistent [955] throughout the years 1946, '47, 48, '49 and '50?

A. I did not go back to '46.

Q. I believe you testified 1946, as I understand.

A. That the rental value was such?

Q. Yes.

A. Oh, I based my appraisal as of 1946, and the rental value as of that date. I thought you had reference had I made any investigation around this vicinity on what land was renting for, these same properties, in 1946. If you are, I can't answer that.

Q. And——

A. On rental. Pardon me.

Q. Upon what investigation, then, did you base

(Testimony of Thomas E. Anderson.)

your opinion that those rental values remained constant?

A. Well, the rental values that I gave you is what exist today. The rental values, in discussing it with people that have rented their farms, they run practically the same. But I have tried to give you—to make myself clear that these rental values that I took into consideration are as of today.

Q. As of today?

A. But as far as back to '46, with the people I have talked with, they run virtually the same. In fact, they got a little higher rentals a while back than they have in the past year or so. [956]

Q. That is, do I understand that they got higher rentals in past years?

A. Yes, because it has been leveling off a great deal on the cost of what they are getting for their produce.

Q. Wouldn't the rental value depend upon the character of the crop?

A. Oh, definitely.

Q. And it would depend upon market conditions?

A. At the time of making the lease, it would.

Q. Pardon?

A. At the time of making the lease, it would depend entirely upon the market value.

Q. And for how long were those leases usually made?

A. Well, I have noticed some of these leases only run for one year. Some are running for three years. Now, the lease on the Winston property has

(Testimony of Thomas E. Anderson.)

been going on for about 12 or 14 years.

Q. The same rental?

A. It was raised a little; not a great deal.

Q. Would you say that that was an exception to the——

A. No, I think it is a good average.

Q. ——an exception to what I understood you to say was a downward tendency?

A. Well, there is a leveling off.

Q. In arriving at your valuations of \$100 and \$75, [957] respectively, for these several fields, how did you arrive at those valuations?

A. Well, the most important factor in San Diego County is water, because water is where you find it, and when you have got the water, that is the most important factor in raising vegetables, or any other type of farming, where you irrigate it. So I have taken an analysis of the average cost of water in the San Luis Rey district, that is, in this particular district, and I have double-checked with the Soil Conservation, and I have double-checked with the Department of Agriculture, and with other irrigation districts.

Now, you take the Vista Irrigation District, I know of land, when there was celery there, at \$100 an acre, and they paid \$25 an acre for their water, that is, district water, and we all know that the average amount of water used is between four and five feet. If it is sandy soil, why, they use a great deal more. And the average pumping in the San Luis Rey Valley, it has dropped down to a low level.

(Testimony of Thomas E. Anderson.)

In fact, some of those wells are pumping 35 and 40 feet below sea level right today, which is bad, and they have had to put in auxiliary pumps, which has increased their overhead on their water. And about the cheapest water I have found in that entire district has been what they consider \$10 an acre-foot. The average price in there for the producing of that water runs from \$15 a foot, up to as high as \$25 a foot, per [958] acre-foot.

Now, then, I have based my appraisal upon the fact that they have given me a price of \$4 per acre-foot on this water.

Q. You say on this water?

A. That is correct.

Q. What property do you mean?

A. On the Sutro property. So no matter which way you look at it, you are saving practically \$10 an acre-foot on your water, and if you use even five acre-feet of water a year, you will save \$50 an acre just on your water alone, which certainly cuts your rental values way down.

Q. Well, is your appraisal, or, rather, your opinion of the water available on the Sutro ranch predicated on water in Pilgrim Creek, or in wells, or both?

A. Well, mine was entirely based upon the fact that he has the wells already drilled, and based upon the production of the wells. I would say mine was based entirely upon his wells, and not Pilgrim Creek.

Q. Based entirely upon wells?

(Testimony of Thomas E. Anderson.)

A. That is right; because he has three wells in there, and his water is—I measured them, and they were within 10 feet of the surface when I measured them at that time.

Q. Well, do you know, or did you investigate, Mr. Anderson, what crops Mr. Sutro or his tenant, or any of his tenants, grew upon his ranch? [959]

A. Well, I never discussed it so much with Mr. Sutro, but I have discussed it with the neighbors in there, and they have told me that they have seen marvelous celery grown upon this property, and good vegetables, and, of course, my opinion of the soil would say it should be a No. 1.

Q. When were those vegetables grown, do you know?

A. Well, it was—understand, I never saw them, but they tell me around, prior to 1946.

Mr. Weymann: I move to strike that. Evidently this is pure hearsay.

The Witness: That is right.

Mr. Cranston: If the court please——

The Court: Most of it is hearsay, isn't it, in this line of evidence?

Mr. Weymann: Well, what the neighbors told him prior to 1946—while we admit there is considerable leeway in expert testimony of this kind, I think this goes a little beyond the limit.

The Court: Well, all he did was to name the individuals. Suppose he just said he heard. Wouldn't that be the same? I think it is a little more definite. I think instead of its being objectionable, it seems to

(Testimony of Thomas E. Anderson.)

me it is a little more helpful to know who the individuals were. Motion denied.

Mr. Weymann: Very well.

Q. (By Mr. Weymann): Mr. Anderson, who were the neighbors [960] with whom you have discussed it?

A. With Mr. Strokes, who is a landowner, and his mother, who is also a landowner and rents her property, and with Mr. Davis, and, the most important of all is the Winstons.

I talked with several other renters in there. They were, naturally, of foreign descent, and so I just paid no further attention to their names, or anything of that kind. I was just taking a general average to see how things checked up, but everything checked. In fact, they checked up the way I have given them to you.

Q. Now, when you refer to the most important of all, you referred to the Winstons, whose farm was located——

A. Well, it is a large piece of land, and I think it gives more the general information that covers larger and heavier investments.

Q. Now, do you know what crops Mr. Sutro's tenants raised after 1946?

A. I do not. I can see where they had that alfalfa on the ground, because the borders were still there, and some old alfalfa sticking around.

Q. But you don't know what alfalfa was raised there, and how much? A. I do not.

Q. Do you know how much—did you make an

(Testimony of Thomas E. Anderson.)

investigation as to how much of that Sutro ranch was available for [961] pasture land?

A. Well, of course, it has all been pasture land, you might say, since 1946. I would offhand say that because it hasn't been operated. That is, it probably had a certain portion of it that I know nothing about, nothing whatsoever. It could have been pasture, and it could have been dry farmed. There is no doubt about it.

Q. You familiarized yourself with the climatic conditions in that valley. Did you take into consideration the annual rainfall?

A. Well, the rainfall really means very, very little, when you come to vegetable growing or raising alfalfa. It doesn't enter into the picture, because we do have a normal rainfall up there, as I understand, of around about—normally around 18 inches.

Q. The normal rainfall is about 18 inches. Have you any recollection or made any investigation as to heavy rainfalls which produced floods?

A. Oh, we have them every once in a while.

Q. That is, you have them periodically, do you not?

A. We haven't had any for a long time. I wish we had.

Q. As a matter of fact, didn't you have one in the season of 1941-1942?

A. Well, we had a little moisture at that time. Yes, we have had some heavy runs, some heavy floods, there is no [962] question about that.

(Testimony of Thomas E. Anderson.)

Q. Heavy enough to flood a good part of the low-land there, wasn't it?

A. Oh, I have seen it entirely flood the low-lands.

Q. On the Sutro property?

A. No, no. That is way above the river bottom.

Q. Did you make any investigation as to what this property would rent for for the growing of beans or alfalfa?

A. Well, No. 1, as far as beans are concerned, beans become rather a—it is a crop that requires a great deal more work operation than barley raising, and then you have got to have your rains just right for beans, or you don't get anything. Barley has always been considered the most profitable dry land crop that we can raise, unless you are in the lima bean section, and it was not. I presume they could raise lima beans there, perhaps, but the land was never prepared for it, and that is intense cultivation and constant work in operating for beans of any kind. Your land must be in perfect condition. If it is barley, it is a very cheap crop to come in, and it has been a very profitable crop as far as dry land farming is concerned.

Q. Did you investigate the possibility in the rental which may be produced from the growing of alfalfa on this?

A. Well, I would definitely say it is not a practical country for alfalfa, because it is ideal for a pasturing [963] matter, where you can pasture it all. But whenever you create an overhead to raise al-

(Testimony of Thomas E. Anderson.)

falfa hay, anything of that character, and in the fog belt, where you cannot raise No. 1 hay, well, I would say definitely it is not a ranch of any type for producing hay for the market, for good pasture.

Q. Is this property in the fog belt?

A. Yes.

Q. Is that a detriment to the producing of hay?

A. Absolutely. It colors your hay, and if you want No. 1 green hay, you have got to keep the fogs off of it.

Q. Does it affect any other crop?

A. Well, it will affect a great many crops perhaps. Our fog is very beneficial to a lot of them, too. You take fogs, they will affect—like wheat, and that type, why, you are apt to get rust, and it will hit oats, such as that, and you are more apt to get rust from the fogs than anything else.

Q. Did you investigate the capacity of the wells on the Sutro property?

A. I investigated the wells. I measured them only, because I had to take the word of Mr. Sutro on the production of these wells.

Q. Now, Mr. Anderson, when you expressed your opinion as to the diminution of the rental value of this property by reason of the pollution of Pilgrim Creek and the wells, did you base that on the assumption that the land was not suitable [964] for the production of any crop?

A. Oh, I put it in my report. I classified the dry land farming, and what the vegetable land would

(Testimony of Thomas E. Anderson.)

have been by itself, and what the dry farmland would have been valued at by itself.

Q. How much of that land, in your estimation, was suitable for the growing of vegetables?

A. Well, I am basing it on 140 acres—the 90—or, it would be 147 acres plus.

Q. Did you, in arriving at your valuation, take into consideration the cost of putting the water on those 147 acres?

A. I took into consideration the cost of delivering the water; not the cost of putting in any of the systems whatsoever.

Q. Let me ask you: Are you in a position to say, then, whether or not the putting in of the 147 acres into vegetables would or would not be an economical operation?

A. Well, I would say it would be a very profitable operation.

Q. Isn't it a fact, Mr. Anderson, that there is a relatively high water table under other lands in the valley, including those which you have examined, in which there is a high water table with equally cheap water?

A. Well, in the valley the water table is very low, [965] practically; in fact, it is dangerously low, because where they were lifting water at 30 and 35 feet, today they are lifting it from 100 to 120 feet in places. Now, up in this particular district, all I could say is the water table, as I measured it in the two wells, stood within 10 feet of the surface of the ground.

(Testimony of Thomas E. Anderson.)

Q. What was the condition that obtained in the adjoining farms that you had investigated?

A. You mean the condition of the farms?

Q. No, the water table.

A. Oh, the water table. They have got a pretty strong lift, even right below Foss Lake there, they lift around 35 to 40 feet.

Mr. Weyman: That is all, Mr. Anderson.

Redirect Examination

By Mr. Cranston:

Q. Mr. Anderson, you were asked as of the date of which you determined values, and you stated that you determined rental values as of today. What did you mean by that statement?

A. Perhaps that was misunderstood to this extent: The people that I contacted, I gave you what the properties were renting for today. In fact, one rental—I will mention Mr. Stokes' name; perhaps I shouldn't—he was offered \$90 an acre for a portion of his place, but he couldn't deliver [966] it because he had another party that had a year's rent to go on it, and he said, "I can rent"——

Mr. Abbott: We object, your Honor, unless the particular transaction is identified, and I only heard the witness say one party.

The Court: Yes, he has identified it as Stokes.

Mr. Abbott: I am sorry. I may have missed a part of the record.

The Witness: And so he said a matter of two or three years ago, he said, we could have gotten a

(Testimony of Thomas E. Anderson.)

higher value for our land than we can today, because all produce of every kind, I think especially vegetables, and I think celery, celery used to be considered one of the most profitable crops we could raise, but it is also a big gamble, and the matter of when everything was at its peak, why, there seemed to be more activity in buying, the market was faster, but the produce buyers today are a little more skeptical about buying, so, therefore, there has been a tendency downward in place of an upward trend.

Q. (By Mr. Cranston): In your opinion, then, would the rental values in 1946 or during the intervening years have had a definite relation to the rental values at the present time?

A. Yes, I definitely do. That is the reason I took the period as a whole. [967]

Q. Do you believe there has been any significant change during that period?

A. I don't think there has been such a great deal. There has been a change, because a matter of two or three years ago there was perhaps three and four persons wanting to lease, where there is only one today. There is that difference.

Q. You were asked if you had observed what crops have been grown on Mr. Sutro's property recently. Will you state, in your opinion, what vegetables could be grown upon the particular acreage as to this rental value you have testified to?

A. Well, on account of the soil, there is no question about the soil standing the very highest test for any type of vegetables. I, naturally, when I

(Testimony of Thomas E. Anderson.)

went over the property, considered it a No. 1 celery soil, I considered it a No. 1 bean soil, I mean string-beans, I figured it was excellent for chili peppers, and, in fact, tomatoes. I know those hills are A No. 1—it is A No. 1 tomato land.

Q. You were asked questions concerning floods. Is the Sutro property peculiarly susceptible to floods, any more so than other agricultural property in the vicinity?

A. No, not so much, because all of the San Luis Rey Valley, the same as the Mission Valley, is always subject to floods.

Q. What effect does the presence of fog have upon the [968] growing of vegetables, such as celery?

A. Well, I don't think it affects celery so much, no. In fact, I don't think—it does color the leaves, that we all know, but so far as the celery part itself, it doesn't have any bad effect whatsoever.

Q. You stated that below Foss Lake there was a lift of 35 to 40 feet. To what did the 35 to 40 feet have reference? Was that the ground level, or the sea level?

A. That was their water table.

Q. Their water table.

A. Of course, they pull their water from way down below that; in fact, down below in the valley there, they put it down below the 100 foot level; 135 feet, some of it.

Q. Then to clarify it, is the 35 to 40 feet which you referred to below Foss Lake, is that the water table as compared with the 10 foot water table to

(Testimony of Thomas E. Anderson.)

which you referred on the Sutro property? Are those figures analogous?

A. Well, it could be. I don't think they have got the water supply there, from what they tell me, but their lift probably will average around maybe 100 feet; but their water table is around 35 feet.

Mr. Cranston: Yes. That is all, unless you have some further questions. [969]

Recross-Examination

By Mr. Abbott:

Q. Mr. Anderson, you have testified that you found Greenfield sandy loam, and Hanford sandy loam on the subject property. Did you observe any other soil types there?

A. Yes. There is a Foster type soil in there, but they are so near alike in productivity that I just classified them as a No. 1 soil. After all, the names really signify its location, and most all of our soils come from a sandy loam formation and a clay formation and such as that, because the Foster type loam soil and the Hanford sandy loam type, there is practically no difference in the productivity of it.

Q. Did you find any Alviso loam on the property?

A. Yes, there is some.

Q. Where was that?

A. You find those in the washes, mostly.

Q. Did you find any Huerraro fine loam soil on the property?

A. Yes.

Q. Where was it?

(Testimony of Thomas E. Anderson.)

A. It is in the bottom, but that is mostly a wash. I think that is more of a general wash condition, that has a good subsoil underneath, and it is nothing like any river bottom sand whatsoever.

Q. What other soil types did you find, Mr. Anderson? [970]

A. Well, I really stopped at the—to me, it most all run, as an average, the majority of it, from the Hanford type up to the Greenfield type, and the other I was not so much interested in going over it. In fact, a lot of that rough stuff, I didn't go over whatsoever.

Q. You mean portions of the land were not investigated by you; is that your answer?

A. Well, the stuff that is not involved in what I appraised. I didn't appraise any of the other stuff on the outside. It is just the 97 acres and the 50 acres. That is the portion I was interested in, and that I did go over very carefully. But the balance of the ranch, which was not involved, I didn't pay much attention to it.

Q. Did you find any Botella sandy clay loam in the areas which you did investigate?

A. Oh, some; a little bit. Small patches.

Q. Where was it?

A. It was down near the—give me that question again, to be sure I am right.

(Question read.)

A. Yes.

(Testimony of Thomas E. Anderson.)

Q. Now, did you find any of the Montezuma clay adobe type soil on the property?

A. The Montezuma clay adobe is not prevalent in that vicinity. That is mostly over in the Otai district, and the [971] Montezuma type comes from a formation that is cut with lime. I think there is an adobe formation in there, but I really don't know of any Montezuma adobe in there whatsoever.

Q. Did you consult the County Assessor's soil map in connection with your investigation?

A. I did not.

Q. Would your opinion be affected in any manner if you were to ascertain that the County Assessor's map does show Montezuma clay adobe?

A. Well, it wouldn't make any difference because there was no Montezuma clay on the soil that I appraised. There could be some Montezuma adobe in there, but, after all, oftentimes even our county is wrong on their maps when it comes to soil. But Montezuma adobe is——

Q. Did you see any of the Ysidora sandy loam soil on the subject property?

A. I don't even know what it is.

Q. In general, are Montezuma clay adobe and Ysidora sandy loam inferior soils, Mr. Anderson?

A. Montezuma adobe is excellent soil, but you have to be very careful in handling it. But the Montezuma soil is used mostly for dry farming, and especially for lima beans.

Q. By the way, I don't think you have given

(Testimony of Thomas E. Anderson.)

us the total acreage of the property that you appraised. What was that? [972]

A. Ninety-seven acres plus, and 50 acres plus. It would be 147 acres plus.

The Court: He gave that, Mr. Abbott.

Mr. Abbott: He did, your Honor. I was in error.

Q. (By Mr. Abbott): Have you consulted the soil map used by the San Diego County Farm Advisers in reference to this particular property?

A. Yes, I have referred to it. I double-checked. I double-checked my own statement.

Q. Does it show any of the soil types other than the ones that you have mentioned?

A. Yes, it showed some Foster type loam soil in there. But even these maps, and even the government reports, are not all definite. We probably have the most diversfield class of soil in San Diego County of any place in the United States, because it is a different type—you jump from one to the other. But I am speaking of it as a whole. It sure has some Foster loam type soil, but as I explained to you before, there is practically no difference in productivity in Foster type loam or Hanford sandy loam soil. They are two very fine soils.

Q. Weren't there some additional soils you haven't mentioned yet today?

A. Perhaps; could be. But not in the 147 acres. There could be a little—sure, there could be some little [973] parcels in there. As I say, our soil is very, very spotted, but taken as a whole, that is

(Testimony of Thomas E. Anderson.)

what it would be classified, no matter who looked it over.

Q. Have you investigated the operating history of all of the wells on the subject property?

A. I have not.

Q. Have you made any inquiry to ascertain whether or not the wells on the higher ground silt up from time to time?

A. Well, I think that could happen to any well in the country. I have trouble with my own well doing that right now.

Q. Do you know whether or not there is a history of that occurring on the subject property?

A. No, I do not.

Q. Would that tendency have any effect upon your appraisal of the lease value of the property?

A. Well, the important thing, I am basing it entirely upon one thing, that the water is there. If the water isn't there, then my appraisal is all wrong.

Q. Then if the well silted up, impeding, or reducing, or eliminating the availability of water, that would affect your appraisal?

A. No, because that could be cleaned out very quickly.

Q. Have you investigated to ascertain whether there has been any history of salting of the wells on this subject [974] property?

A. Not on this property whatsoever, but they are down below.

Q. How far down below?

(Testimony of Thomas E. Anderson.)

A. Salt has been coming up for several miles up and down the San Luis Rey River.

Q. What is the closest point to the subject property on which that has occurred?

A. It goes up way beyond—it goes up the valley three or four miles above this property. This property is way above the valley line entirely.

Q. You say the salting occurs three or four miles above this property?

A. No, in the San Luis Rey Valley. That is the only place the salt is showing up.

Q. Have you conducted any investigation to find out whether or not that has been happening up there?

A. Yes. I took that up with the farmers up there, and even with the Chamber of Commerce, and they are all worried about it.

The Court: I think we will suspend for a few minutes now.

Mr. Abbott: Very well, your Honor.

(Short recess.)

The Court: Proceed, gentlemen. [975]

Q. (By Mr. Abbott): Mr. Anderson, I believe you testified on direct examination, and also on cross, that your appraisal of rental value of this property was very much affected by the fact that there was only a 10-foot lift required in bringing water to the surface of the wells on the Sutro property.

A. No, I didn't say that.

Q. Well, correct me if I have misstated you. In what way was my statement incorrect?

(Testimony of Thomas E. Anderson.)

A. I said that the water can be delivered at so much per cubic—so much per acre-foot; that I did measure the water, and the water stood within 10 feet of the surface, but I did not make the statement that they could pump water without lowering it from that point.

Q. Where did you get the \$4 per acre-foot figure that you mentioned?

A. As I told you, that came entirely from the statement that Mr. Sutro could deliver the water at that, and it is up to him to prove it.

Q. It was Mr. Sutro's statement?

A. That is right.

Q. Did you ascertain what the level of the water was when the wells were being operated?

A. No, I did not. That is still up to him.

Q. Now, which is the important consideration in [976] determining the value of land? Is it the standing level of the water? A. No.

Q. Or is it the drawdown level?

A. No. The cost of putting that on the land, which was given to me at \$4 per acre-foot, that is what I am basing my appraisal on.

Q. Did you agree with that estimate?

A. I have no reason to be to the contrary.

Q. Now, in appraising real property—

A. (Continuing): Yes, I know you can deliver the water for that.

Q. You do?

A. That is according to other wells. I happen to know something about that in this particular

(Testimony of Thomas E. Anderson.)

vicinity, because I happen to have a couple of wells of my own, but I don't know how—he has to put the water on this land at \$4 per acre-foot, and that is where I based my \$100 per acre valuation on.

Q. Do you feel you are qualified to state whether or not that is a correct estimate of the cost of putting the water on the land? A. No, I am not.

Q. In appraising land, do you from time to time consider water availability in determining how much the land is worth? [977]

A. Oh, absolutely.

Q. And when you do that, do you ascertain how far the well must pump in order to deliver water to the surface?

A. I take the man's statement. Then if there is anything to the contrary, then, naturally, I always put it up to the buyer that this is the statement of the owner.

Q. Well, we are not selling real property.

A. I am basing the same thing on this.

Q. Well, how much of a drawdown is consistent with that value or price of \$4 an acre-foot to produce?

A. Oh, I think you could put it down to probably the 75-foot level.

Q. And still produce it?

A. Yes, we do, without any doubt.

Q. I see. Then what is the difference between this property and the property farther down the valley, where you testified to a drawdown of 35 feet?

(Testimony of Thomas E. Anderson.)

A. Well, their water table has dropped down to practically nothing. In many places in the San Luis Rey Valley they have had to go down and down to follow the water.

Q. But in many places they go down to 35 feet; isn't that right?

A. They have a water table of 35 feet, and that is the statement I made. Water is where you find it. This water I am speaking of is above the river bottom, so it comes [978] from some other source. It does not come from the river bottom for most of the ranches of the San Luis Rey Valley. Their water comes from the valley itself.

Now, they have been going down, and they have been hitting sea water, so they have gone down 35 feet below sea level, and they are afraid to go down further, for fear they might hit salt water.

Q. At any rate, you have never ascertained the drawdown rate on the subject property?

A. I have not. I am just taking the statement that he could deliver that water for \$4 per acre-foot, and that is what I am basing my opinion on.

Q. Did you also accept Mr. Sutro's valuation of the rental value over the six years in question?

A. No, I did not. I never talked to him about it.

Mr. Abbott: Your Honor, it may be pertinent at this time to call the court's attention to the drawdown figures appearing in the notes of the plaintiff, Exhibits 42 and 41, which range from 80 to 91 feet.

Q. (By Mr. Abbott): Do you know when the

(Testimony of Thomas E. Anderson.)

wells on the Sutro property were drilled, Mr. Anderson? A. I do not.

Q. Now, in testifying to your opinion of rental value, you assumed that those wells were on the property during the entire time that you were appraising rental value? [979]

A. Well, either way. It would make no difference to me whether they were put on there a week, or two or three months, as long as they can produce that water. I was only interested in water, and that is the only thing I was interested in, and that is what I based my appraisal on, is the fact they have the water to deliver on this land at so much per acre-foot. That is what I based my appraisal on, and I had no other way of determining any other value whatsoever, or any other basis.

Q. Would your appraisal of the fair rental value in 1936 be any different if there was but one well on the property in that year, and it was on the high land part of the property near the old house?

A. Well, we would not be taking in as much territory as we are today, because at that time they were only irrigating a certain portion of the ranch, and only, I think, about 90 or 97 acres. Now we are talking about 147 acres.

Q. Precisely.

A. Now, I don't know—at that time, I understand from the testimony that has been given, they had an abundance of water there to produce crops

(Testimony of Thomas E. Anderson.)

from their well and from Pilgrim Creek. I have no other way of——

Q. Well, you haven't answered the question, which was: Would your opinion be different if there was but one well on the property in the year 1946? [980]

A. You mean if there was only one well there today?

Q. No, sir, in the year 1946.

A. Well, it would be based—it wouldn't be on the 97 acres. It would be just the same, because they were irrigating that, and they had the water they claimed for that. So I based it absolutely the same, because the water was already there, it had already been farmed, and had been farmed to vegetables. So they apparently had the water for that 97 acres at that time out of Pilgrim Creek and out of Well No. 1.

Q. How about the balance of the acreage which you have appraised?

A. That came in after he had drilled these other wells.

Mr. Cranston: Mr. Abbott, his testimony on that was limited to the year 1951 on the additional 50 acres. He did not testify the additional 50 acres could have been irrigated prior to 1951.

Q. (By Mr. Abbott): I take it from your last answer, Mr. Anderson, that your estimate of the availability of water is based in part on the volume of water flowing in Pilgrim Creek during the years prior to 1951? A. Right.

(Testimony of Thomas E. Anderson.)

Q. Have you ascertained the amount of water which flows in Pilgrim Creek, exclusive of the amount of effluent from the sewage disposal plants?

A. None whatsoever; just based upon the fact that if [981] this land was farmed to vegetables, and they had sufficient water to operate the ranch, my valuation is based on those facts only, and I knew nothing about where the water comes from, except they took it out of Pilgrim Creek and out of Well No. 1, and they said they had sufficient water to farm and operate the ranch. Therefore, my appraisal is based entirely upon that.

Q. Calling your attention now to the map, which is Plaintiff's Exhibit 32, and which map reflects areas 1, 2, 3, 8, 9 and 10, as to which you have given a uniform valuation of \$75 per acre for each of the years in question——

A. '51 to '53?

Q. Yes. Now, do you find that the rental value of each of those several areas is the same, Mr. Anderson?

A. Well, I based it as a whole.

Q. You mean certain of the areas have a higher rental value and certain of the areas have a lower rental value?

A. I would, yes, because it has to be put in a productive state, and, therefore, why, naturally the value could not be put up as high as it is on that that had already been farmed.

Q. How about area No. 3—focusing on that area alone?

A. Now, let's see. What is area No. 3?

Q. Have you computed separately the rental value—— [982]

A. Yes.

(Testimony of Thomas E. Anderson.)

Q. ———of that area during the period in question?

A. That is based, yes. That is based on the \$75 an acre basis.

Q. So you assigned a rental value of \$75 per acre to area No. 3?

A. No, I put it as a whole, not as a unit, because some of that has got to be worked down and put into shape in order to make it adapted to producing crops. There is some of this has not even been farmed—it has been farmed perhaps at one time, but to raise vegetables, there are some erosions in there that have to be taken care of. They are minor, but I took the whole thing as a whole, not as an individual parcel, and put the estimate on the entire 50 acres. There is some of that where there has to be a great deal more work done than on the other.

Q. Well, is your estimate of the rental value based upon work not yet done?

A. How is that?

Q. Is your estimate of the rental value based upon work not yet done?

A. Absolutely. That is the reason I put it at \$75.

Q. In other words, you are testifying to what the rental value of the property might be if certain improvements were effected; is that it? [983]

A. Well, it has to be put in a state of cultivation to grow vegetables, yes.

(Testimony of Thomas E. Anderson.)

Q. Well, do you have any separate appraisal or rental value of area No. 3?

A. No, I classified it all as a whole. There is only one—what is it—it is 1.9 acres. Now, that is a small acreage. If you or anybody else could figure out what that would be worth by itself, it would not be worth anything by itself.

Q. How about area No. 2? Have you a separate estimate of the rental value of that area?

A. Well, that is another small parcel of 2.77 acres. If you would classify that by itself and value it by itself, sure, I would not give it any consideration, but I am taking it as a whole.

Q. Is it economically feasible to farm either of those areas?

A. Yes. The land is all right. I went over every parcel of it.

Q. Then you do not agree with Mr. Tedford's opinion that those two areas cannot be economically or feasibly farmed?

A. It can be; sure, it can, but I say there is more work to be done on some of those than there is as a whole. Definitely, it could be farmed. It is a good piece of soil. [984]

Q. You don't think the gradient of the land has any bearing upon its rental value in that area?

A. The what?

Q. The gradient of the land.

A. Well, I don't know how to answer that. The fact of the matter is—I would say no.

Q. Now, in testifying to your opinion as to

(Testimony of Thomas E. Anderson.)

rental value during the years in question, did you assume that there were any irrigation facilities on the land, other than those which were in fact on the land?

A. Well, they had the irrigation ditch there, and they had the pipeline on top of the mesa, which I naturally observed, and they had the water up there and at one time under cultivation, which I know, because it has been so testified in your court.

Q. Then did you consider those facilities to be adequate? A. No, absolutely not.

Q. But they were adequate to produce a rental of \$100 per acre on a part of the land?

A. No. Well, at that time they were kept up, they were in condition to operate, but when I saw them, they were in no condition to operate.

Q. Were they in condition to operate during the years 1946 to 1952? [985]

A. They must have been. They were farmed. They were operated at that time.

Q. During that period, then, were those facilities adequate to irrigate the land for the crops which you contemplated in forming your opinion?

A. Oh, definitely, as far as that portion of the land is concerned, yes.

Q. Which portion of the land?

A. The 90-some acres.

Q. Well, in other words, the existing irrigation system was adequate to irrigate for the vegetables which would produce the rental value, would it?

A. From the testimony that has been given, and

(Testimony of Thomas E. Anderson.)

from the statement that I had, they had an adequate water supply from Pilgrim Creek and from Well No. 1 to irrigate the entire 97 acres plus, because it had already been farmed and farmed to vegetables.

Q. My present question is directed to the irrigation facilities, not to the adequacy of the water. Were those facilities in the years 1946 through 1952 adequate to grow vegetables upon the acreage you had appraised?

A. I never saw the vegetables grow there, but the fact is they have testified they grew the vegetables there, so I definitely say yes.

Q. And you are basing your testimony as to fair rental [986] value upon the assumption that those facilities were adequate?

A. Definitely. Sure, they had to be definite, or they could not have operated and farmed it to vegetables.

Q. By the way, there is only one road that goes up to the Sutro ranch, isn't there, from Oceanside?

A. There is only one I ever saw.

Q. Yes. Now, as you were driving up that road, and driving inland, did you pass fields of alfalfa on the way? A. Yes.

Q. Some of those fields have been there for a good many years, haven't they?

A. Yes. I think so, yes.

Q. Are they in the fog belt?

A. Yes, they are in the fog belt, but they mostly use that for pasturing purposes.

(Testimony of Thomas E. Anderson.)

Q. Is it your testimony that the alfalfa grown in that area we have just described is not baled and sold for hay——

A. It is not No. 1 hay. You can't raise No. 1 hay in that entire vicinity.

Q. My question is, is that hay being baled and sold commercially, to your knowledge.

A. To my knowledge, I have never heard of any of it being sold.

Q. Do you know what crops are grown on the Whelan farm? [987]

A. No, you have got—I can't answer that.

Q. Do you know whether alfalfa is grown on the Whelan farm?

A. Does that join—what place, and perhaps I can tell you. I don't know it as the Whelan farm.

Q. Now, can you explain to the court, Mr. Anderson, why you chose dry crops as a basis for estimating rental value under assumed conditions of polluted water?

A. No. 1 is, I understand that with the polluted water you could not use the water in any sense of the word for anything pertaining to public consumption and for human consumption.

Now, as far as grain is concerned, why, I have been advised for even raising alfalfa hay, you couldn't raise the green feed and feed it to the cows, because that goes directly to the human consumption there. But you could raise the cured hay, and sell the cured hay, and you could raise

(Testimony of Thomas E. Anderson.)

any other type of dry land crop, and it would not be affected by the polluted water.

Q. Now, if there were no such limitation upon the use of the land for alfalfa grown with the water in question, would you have formed a different opinion as to the highest and best use of the land with the so-called polluted water?

A. I do not mean to say that alfalfa is not a profitable crop, because I am a great believer in alfalfa. But we [988] also know, as a whole, that you can't very well use the pumped water for alfalfa purposes and make hay out of it, because it becomes a very expensive operation and would not be profitable, I don't think, in any sense of the word. So that you could not compete with places like in the Imperial Valley, and, No. 1, they cannot raise No. 1 hay anywhere near the coast where they have fogs, because fog colors your hay, and when you color your hay, it is not merchantable hay as far as No. 1 hay is concerned.

Q. Suppose the hay is cut green?

A. You can't feed it to the cattle then, because you are licked again on account of the polluted water, because that is the way farmers are farming. Farmers operate that way. Now, they feed their alfalfa green.

Q. Your assumption—or, correction—your opinion as to the highest and best use of the land is based in part on the assumption that the alfalfa grown on the land could not be sold for animal consumption?

(Testimony of Thomas E. Anderson.)

A. The hay can, but not the green. The hay can be sold for animal consumption, but not the green feed.

Q. And your last statement constitutes one of the assumptions upon which your opinion is based; is that correct?

A. Well, my opinion is it would be too expensive to raise alfalfa hay for that one purpose, for selling hay.

Q. Would it be too expensive to raise it for feeding [989] to animals, if that is permitted under the law?

A. If you could feed it green, yes, it is excellent, but not if it is dry, because you still have got an expensive operation there per ton in producing the hay.

Q. Now, are flowers grown commercially in northern San Diego County?

A. Oh, somewhat.

Q. It is one of the major crops in that area, isn't it?

A. No, I don't think so. I wouldn't say that, not by any means. It has been a hobby with a lot of people, and they have been going into it quite a bit, I will say that, on small scales.

Q. Could flowers have been grown upon the acreage which you appraised?

A. Yes, I don't think there is any doubt about it.

Q. What would be the fair rental value of the acreage for the year 1946 if planted to flowers?

(Testimony of Thomas E. Anderson.)

A. I don't think you could have rented it. I don't think it would rent—if you went out to look for a person today, somebody that wished to raise flowers. I have talked with a lot of these people raising flowers, and it is more of a hobby to them. There has been one or two people, I think, in San Diego County that have gone into it commercially, but it is still a hobby. I don't think—you might rent five or ten acres, you might rent 25 or 30 acres, but [990] as a farm, no, you couldn't rent it for flowers. I think it would be humanly impossible.

Q. Well, aren't there substantial acreages in this valley which are being currently rented for the commercial production of flowers?

A. Yes, perhaps. I don't know how many acres; maybe 40 acres. I don't know. I know there are flowers being raised up in there, but it is still a hobby, you might say. You take the poinsettia farm at Carlsbad. That is the biggest acreage of flowers I know of in Southern California.

Q. So your testimony then is that the land has no rental value for the purpose of planting flowers or renting it for the purpose of planting to flowers?

A. I definitely say it would have no commercial value whatsoever as far as the entire acreage is concerned. I don't think you would ever find a renter for it.

Q. Was this land suitable for wet pasture during the period from 1946 to 1952?

(Testimony of Thomas E. Anderson.)

A. Yes, if the State Board of Health would let you pasture it.

Q. Now, in giving your opinion as to the rental value of the land during that period, assuming what we are calling polluted water, did you assume that the land could not be used lawfully for wet pasture during that period?

A. Yes, I did, definitely. [991]

Q. And that assumption is material to your opinion as to fair market value?

A. I took it, the most profitable crop that I know of, as I said before, all over San Diego County is barley.

Q. The most profitable crop?

A. That is correct, and that is what you would have to classify all of that, as a dry crop proposition, because to raise barley and irrigate it would be another thing that I never heard tell of, because it would be too expensive an operation.

Q. Well, will the barley produce higher rental during the period in question than would flowers grown commercially?

A. Oh, I don't think so. I think flowers probably would demand a big rental.

Q. Would the barley during that period produce a higher rental than would the use of the land for wet pasture?

A. As I said before, if you could use it for wet pasture, it would be the finest thing in the world.

Q. Well, let's assume that.

A. Well, I couldn't assume it, because they said

(Testimony of Thomas E. Anderson.)

the water was polluted, and it couldn't be used for wet pasture or green feed. It could not even be fed to dairy cattle and the milk sold for human consumption. So that is what I based my facts on.

Q. What would be the fair rental value of the property [992] during the years in question when planted to black-eyed beans?

A. There comes another question, about your raising black-eyed beans. That is not a cheap crop to raise. You have got to work your land into a very high type of cultivation, and you have got to plant it at a certain time of the year, and your rains have to come just at a certain time, or you get nothing. You are lucky if you get two or three or four sacks to the acre.

Mr. Abbott: Will you read the question, Madam Reporter, please?

(The question was read.)

The Witness: One-fourth the crop.

Q. (By Mr. Abbott): And how much would that yield over the years in question?

A. As I say, the black-eyed beans that I saw last year, the best I saw would average around five to six sacks to the acre.

Q. The question is a question which relates to the average yield on a share basis over the six years from 1946 to 1952, when planted to black-eyed beans.

A. I don't think anybody could make a statement on that, because it depends entirely upon your

(Testimony of Thomas E. Anderson.)

rainfall conditions; and while barley doesn't necessarily have to depend on that. We have always raised a pretty good barley crop, even during this period of dry season we have been having. [993]

Q. And assuming that the black-eyed beans are being grown on the Sutro land during that 6-year period, with water which has been loosely called polluted, which has a certain precise meaning for the purpose of this hearing, but assuming that water is being used to irrigate the black-eyed beans, then what is the fair rental value?

A. Well, cash rental, I would hate to say, but it would certainly produce the beans.

Q. It would produce the beans?

A. Well, there is no question that with irrigation it would produce anything.

Q. And what sort of a yield would that be per acre per year?

A. Oh, I would say around 20 sacks.

Q. And how is that, translated into dollars?

A. I don't know the value of beans today. I couldn't answer that.

Q. Did you consider this line of analysis in determining the fair rental value?

A. No, I did not, because to operate that as a bean proposition, if you could have farmed it, that is an entirely different thing. I have never gone into that, but it would be an expensive operation even at that, because if they wanted to raise black-eyed beans, I don't know of but a very few places in Southern California that they ever irrigate [994]

(Testimony of Thomas E. Anderson.)

them, because, after all, you are putting expensive water again onto a cheap crop, that you don't get a very big production on.

Q. Well, I think you have said, or at least that you are informed that this \$4 per acre-foot water was about the cheapest water available.

A. That's right. I wouldn't say yet whether you should farm it to beans or not.

Q. In any event, you have never made any study to determine the economic feasibility of farming it to beans, have you? A. Absolutely no.

Mr. Abbott: If the court please, at this time the defendant moves to strike all of the evidence of the witness relating to valuation of the land or valuation as to fair rental value on the ground he has not shown that degree of familiarity with the property, with its history, with its uses, with comparable transactions, with all the agricultural facts and opinions which are required in order to ascertain the fair market value. In particular, he has shown virtually no knowledge of the transactions in the neighborhood, both of sale and of lease, and his opinion as to the property is expressly made largely in reliance upon the owners' representation as to the availability of water, which representation is inconsistent with the figures which the owner has here produced [995] in court. I find nothing in the record which will substantiate an opinion which this court may consider.

The Court: Motion denied.

Mr. Abbott: That is all.

(Testimony of Thomas E. Anderson.)

Redirect Examination

By Mr. Cranston:

Q. Mr. Anderson, you were asked concerning the assumption of facilities to irrigate the property. I understand—correct me if I am wrong—that you did assume, in so far as the entire acreage which you appraised is concerned, that facilities would be provided to deliver water to that entire area; is that correct? A. That is correct.

Mr. Abbott: May I move to strike the answer for the purpose of objecting to the question?

The Court: Yes.

Mr. Abbott: The question assumes an erroneous state of the record. The witness has testified that his opinion was based upon an existing irrigation system, not upon facilities to be put in.

Mr. Cranston: If I may——

The Court: I don't think so. The answer will stand.

Q. (By Mr. Cranston): You appraised, or you gave an opinion as to the rental value of the 50 acres for a period of three years only; is that correct? [996] A. That is correct.

Q. Were you advised that prior to that time facilities would not have been available for the irrigation of that 50 acres? A. Prior to 1951?

Q. Yes, that is my question. A. Yes.

Q. You were asked concerning the use of areas 1, 2 and 3 for the growing of crops, and were asked concerning the gradient in these areas. I call your attention to the topographic map which is before

(Testimony of Thomas E. Anderson.)

you, and ask you if the gradient—first I will ask you what do the figures represent, 60, 65, 70, 75, for example, in Field No. 2?

A. That is the grade, the elevation.

The Court: Speak a little louder, please.

The Witness: It is the elevation between the different levels.

The Court: The contours?

The Witness: The contours.

Q. (By Mr. Cranston): Do those contours indicate a steep or a gentle rise?

A. Oh, they would indicate a very gentle rise.

Q. That is in Field No. 2?

A. That is in No. 2, yes.

Q. Now, in Field No. 1, do they indicate a steep or a [997] gentle rise?

A. Well, I would say a very gentle rise.

Q. And in Field No. 3, do they indicate a steep or a gentle rise?

A. That is a very gentle rise, too; very slight. I know I walked all over those.

Q. In other words, is the slope in those areas too steep to permit the growing of vegetables?

A. With contour irrigation, absolutely no.

Q. You were asked whether you had put a valuation upon those fields separately, and stated that you had considered them as a unit with other fields.

A. That is right.

Q. What caused you to group them with other fields?

A. Well, the parcels were small parcels to begin

(Testimony of Thomas E. Anderson.)

with, and the other acreage was the principal acreage, and the majority of the larger tracts were much easier to put into a high type of cultivation, and, therefore, I didn't particularly put a great deal of value to this, except it tied in with the other acreage.

Q. Is the rental value of those fields affected by the fact that they are adjacent to other fields which could be rented?

A. Well, I would say yes. It is—no, it is in no way affected by that, I don't say that at all, because the [998] land is there, the soil is there, and the availability is there, and it ties in with the other acreage as given to me, and I simply classed it as a whole, not as each individual separate property because if I did, I perhaps would put this at one price and some of this other on a higher basis, but I simply put it on an average of the entire tract as a whole.

Q. You were asked concerning various soils which were present on this property. Was there any Diablo soil present in any part of it?

A. Well, as I said, there are several mixed soils up in that country. We have it all over the county. Sure, there is perhaps a little clay, a little adobe, in portions of the place, but very, very limited, of the adobe there is. There is no question about the value of it, because it is excellent land if it is properly handled. But that is very limited.

Q. With respect to the growing of flowers, have there been any rentals of acreages of 97 acres, or

(Testimony of Thomas E. Anderson.)

140 acres, or any areas of any similar magnitude in northern San Diego County, to your knowledge, for that purpose?

A. I could say no on that, because they are all spotted parcels, and mostly hobby, except with two different ranchers, and they specialize in them. But the rest of them are mostly hobby people.

Q. Is the growing of flowers a specialized matter? A. Definitely so. [999]

Q. Is it more difficult to grow flowers than it is to grow vegetables?

A. Oh, definitely, it is. They are temperamental, just like everything that goes with it. You have got to know just how to handle them.

Q. Mr. Anderson, you were asked upon recross-examination concerning the drawdown of the water in Mr. Sutro's wells. The figure of 35 feet to 40 feet which you gave in connection with the wells below Foss Lake, was that prior to drawdown, or considering drawdown?

A. No, that was before the drawdown.

Mr. Cranston: That is all.

Recross-Examination

By Mr. Abbott:

Q. One question on the last point: What was the drawdown on those properties below Foss Lake?

A. Well, the one statement I had, they drew down to 100 feet.

Q. And what is the name of that ranch?

A. The Stokes ranch.

(Testimony of Thomas E. Anderson.)

Q. Do you know the drawdown on any of the other ranches in that area?

A. Well, I talked with Mr. Davies, and his drawdown—well, he is pumping water at the 125 or 135 foot level, I wouldn't be positive just which. [1000]

Q. Does contour irrigation type farming of vegetables ordinarily, in your opinion, on this land, will that produce an annual rental of \$75 per acre?

A. Most of our rolling land is contour farmed, and hill land, and some of that is the best vegetable land we have. Contoured farming is not much more difficult than the other, when your land is properly laid out.

Q. But is the rental value, when the vegetables are grown with contour farming on this land, as high as \$75 per acre?

A. Yes, I know several places where they have been getting it. In fact, Colonel Atkinson's place in this same vicinity, he told me he had his rented for \$75, 50 acres of it farmed to vegetables, two years ago.

Mr. Abbott: No further questions, your Honor.

Mr. Cranston: I believe that is all.

The Court: That is all, Mr. Anderson. We will excuse Mr. Anderson, gentlemen.

Mr. Cranston: Yes, excused.

(Witness excused.)

The Court: Call your next witness.

Mr. Cranston: All right. Mr Sutro. [1001]

No. 14588

United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,
vs.

ADOLPH G. SUTRO,
Appellee.

ADOLPH G. SUTRO,
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Transcript of Record
In Two Volumes

Volume II
(Pages 313 to 690)

Appeals from the United States District Court for the
Southern District of California,
Southern Division.

FILED

MAR 10 1955

PAUL P. O'BRIEN,

CLERK

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ADOLPH G. SUTRO

called as a witness in his own behalf, having been previously duly sworn, resumed the stand and testified further as follows:

Redirect Examination

By Mr. Cranston:

Q. Mr. Sutro, you have heard some of the cross-examination of Mr. Anderson in connection with the growing of black-eyed beans. I will ask if at any time during the period in question you endeavored to secure permission to grow black-eyed beans? A. Yes.

Q. Were you successful? A. No.

Mr. Abbott: I object to this, your Honor. The question is not whether Mr. Sutro secured permission from an unidentified person, but what the law provides, and I think the regulations speak for themselves here. I don't know to whom he applied. But we may look to the face of the regulations to determine what could or could not be grown on such a property.

The Court: Is there any question about that at all, as a matter of fact, on the record made to date? If there is, that is the question.

Mr. Abbott: It is my understanding—I will have to turn to the regulations to get the exact language, but it is [1002] my understanding there is nothing there that prohibits the use of the land for the growing of black-eyed beans.

The Court: At any time during the period?

(Testimony of Adolph G. Sutro.)

Mr. Abbott: Yes, your Honor. If counsel has that regulation here, I am sure I could find it.

Mr. Cranston: I believe, your Honor, as to Mr. Sutro, if he requested permission from the proper authorities and was denied it, regardless of the regulations, that certainly would affect the rental value on the use of the property.

The Court: No, I think it is a question of the validity of a regulation or law, not what some individual says, and Mr. Sutro isn't the type of a man to rest his property rights upon any such a situation. I didn't think there was any question about the wording, the verbiage of this regulation that is in question.

Mr. Abbott: Is it the court's recollection that the regulation would permit the growing of the beans?

The Court: No, it is not. It is to the contrary. Now, that is not an infallible situation. It is a long time ago since I remember of hearing that regulation read, or reading it.

Mr. Abbott: The regulation is in the record. The clerk may have the exhibit.

The Court: Yes, I think it is in the record. I don't remember the number. [1003]

Mr. Abbott: I have a copy of it here, but it might take a moment or two to find it.

The Court: You have all of the exhibits here?

The Clerk: I think so, your Honor. From the previous hearing?

The Court: From the San Diego hearing.

(Testimony of Adolph G. Sutro.)

The Clerk: Yes. I have quite a number—I have four or five folders here.

Mr. Cranston: Would the court permit me to inquire as to what the facts were as to Mr. Sutro's requests for permission?

The Court: I don't know what the record will be. I presume they will object to it. I don't know, because they have been objecting a great deal. If they do, I want to know what the regulation is before the ruling is made.

Mr. Abbott: I have received further information on that, your Honor. Apparently, the regulation permits the use of pre-irrigation on black-eyed beans, which, agriculturally speaking, is an assurance of the equivalent of rainfall, and makes the growing of the crop feasible; but the water which does not meet the standard of Rule 4 of the regulations can be used for that purpose.

The Court: Very well. Then there is no use in asking your question, if that is the case.

Mr. Cranston: Of course, my understanding is contrary [1004] to Mr. Abbott's, and I think we are entitled to show——

The Court: You had better get the regulations, I think.

Mr. Abbott: It is in the record, I think, and we can get the regulations.

The Court: I don't mean now. You can look it up, can't you, and ask him some other questions you think are necessary to be asked in the case?

Mr. Cranston: Yes.

(Testimony of Adolph G. Sutro.)

Q. (By Mr. Cranston): Mr. Sutro, do you have an opinion as to the rental value of your property during the years 1946 to 1953? A. I do.

Q. On what is that opinion based?

A. On conversations with landlords and tenants——

Q. In the neighborhood?

A. ——renting comparable property in the neighborhood.

Q. Will you state what investigation you made in this connection?

A. You mean who I talked to, what was the conversation—or, would you tell me just what——

Q. Yes, if you will state the investigation that you made, to whom you spoke, and what information you received.

The Court: Is this another memorandum you have, Mr. Sutro?

The Witness: Yes, your Honor. I always write these [1005] things down.

The Court: They will be asking for it.

The Witness: Well, I don't know what I can do.

Mr. Abbott: We will try to be brief, your Honor.

The Court: That is all right.

(The document was handed to counsel.)

Mr. Cranston: Madam Reporter, if you will read the pending question.

(The question was read.)

Mr. Weymann: If the court please, that is ob-

(Testimony of Adolph G. Sutro.)

jected to. This is a lay witness testifying as to information received from other parties. He may testify that he made the investigation, and that his opinion is based upon that, but he is not in the position of an expert who forms an opinion based on an investigation. He is presumed to know the value of his own property, and I think that is as far as he can go.

Mr. Cranston: If the court please, I believe that he is entitled, as the owner of the property, not only to state what it is, but to state the factors which have induced him to reach that opinion.

The Court: The only matter of doubt in the court's mind is as to whether—and I don't remember of having reviewed it before—the owner of the property, who is not offered as an opinion witness in the sense that he is classified as an expert, can testify on direct examination, and it is [1006] proper for him to state the persons with whom he conferred. These are very narrow rules in condemnation cases. I don't know whether the same rule would apply in a federal Tort Claims case or not. I have some doubt about it.

What is your basis for the objection?

Mr. Weymann: Well, the basis for the objection is this fact: that the only reason that I have been able to discover that an owner may testify as to the value of his property is that he is presumed to know the value of the property, and he cannot base his opinions on investigations and statements of other people. I have never known that to be used in

(Testimony of Adolph G. Sutro.)

any question of valuation as far as the owner is concerned. He is in an entirely different category from an expert witness.

The Court: I do not see how the mere expression in monetary figures would help the court at all, because on cross-examination you will be asking him those various things, as to whom he talked, and so forth, or if he saw John Doe and that he made a certain leave at such and such a time.

Now, if that is a subject matter for the purpose of testing the weight of his opinion—I am not speaking now of a condemnation case; I am speaking of a Tort Claims action, where it is a suit for money damages, and where the owner, as such, has a right to testify as to what he thinks is the proper measure of his damages. I am inclined to think that he has a right to state the basis. I am not talking about [1007] identifying the individuals, although I can see how on that it may be proper for him on direct examination to mention those specific persons or entities which he contacted, because that is a factor that will go to the value of his opinion.

It certainly is not a rule that because a man owns property, ipso facto, he is entitled to great weight, because it is a question of the weight of the evidence whether he be the owner, or whether he be some expert who is called to testify on the question of the value of the property.

Now, if the opinion, and that is all it is, a mere matter of opinion, whether it be the owner or an expert witness—if the opinion is to be measured by

(Testimony of Adolph G. Sutro.)

what he did in his investigation, or what you call the analyses, I do not see why he cannot state what investigation he made.

I am not now sure about his telling who the individuals were that he talked to, because it seems to me and I have always thought that that was rather an insecure matter on cross-examination, because each side picks out the individuals that they think are the worthwhile persons to talk to about those matters, and there on one side you have John Doe and Jane Smith, and on the other Sarah Emerson and somebody else.

In most cases in condemnation suits they do not appear, so that the trial judge can see them and hear them testify. I am confident that in condemnation cases there is a restriction on the ruling as to whether it is direct evidence [1008] or whether it is cross-examination.

Now, I think it is getting to the hour of adjournment. I think I will take it under advisement, think it over and do a little research on it. Do you have any authorities to cite?

Mr. Cranston: I could find no authorities involving a Federal Tort Claims Act.

Mr. Weymann: I have just one idea, your Honor, in that connection. Of course, the opinion of an expert witness on the state of his investigation is one of the exceptions, recognized exceptions, to the hearsay rule.

Now, I doubt if this witness is permitted to testify that he conferred with John Jones and John Jones told him it was worth so much per acre. I

(Testimony of Adolph G. Sutro.)

don't know whether your Honor has that in mind, the names and the amounts, but that I think would come within the exception to the hearsay rule. I just wanted to amplify my objection in that respect.

The Court: As I say, I think I will think it over during the night.

Is this the regulation you have in mind?

Mr. Abbott: Yes, your Honor; I assume it is. It looks like it from here. I think we can point out the language.

The Court: You can leave the stand, Mr. Sutro.

Mr. Abbott: Yes, your Honor. I call the court's attention and counsel's attention to Rule 3:

"Effluents of septic tanks, Imhoff tanks or [1009] of other settling tanks or partially disinfected effluents of sprinkling filters or activated sludge plants or similar sewages, shall not be used to water any growing vegetables, garden truck, berries, or low-growing fruits," etc.

Now, we will introduce evidence at a later time to the general effect that black-eyed beans can be grown feasibly, economically, and with a reasonably high degree of safety by pre-irrigation, and that that practice is widely followed with water that does not meet the standard of Rule 4, but only meets the provisions of Rule 3, which cover the provisions for the growing of vegetables under pre-irrigation, which is the practice which we described.

The Court: What do you mean by "pre-irrigation"?

(Testimony of Adolph G. Sutro.)

Mr. Abbott: The land is thoroughly irrigated prior to the planting of the seed.

The Court: It is prepared for the planting?

Mr. Abbott: Yes.

The Court: I don't know. I will think that over also. That is Exhibit 1 in the case.

Now, tell me how much more time you are going to consume in the plaintiff's case.

Mr. Cranston: Your Honor, we will have the testimony of Mr. Sutro as to the value which I mentioned, and we will have his testimony concerning the building plans and specifications, [1010] which presently are in the possession of the defendants for their further examination.

Then we will have some testimony in regard to how he has determined what farm equipment and machinery is necessary. We will then have a witness as to the farm machinery, and a witness on the valuation, or, I should say, the increase in building costs.

That would be Mr. Sutro and two other witnesses. I do not see that that testimony can all go in tomorrow, but we should be able to finish the plaintiff's case on Thursday, that is, allowing for cross-examination and the opportunity for objections. I do not see how it can all go in tomorrow.

The Court: Can you finish by Thursday noon?

Mr. Cranston: I think we would finish, and I would hope to finish by Thursday noon, but I cannot guarantee it. I would say that we would finish by Thursday afternoon.

(Testimony of Adolph G. Sutro.)

The Court: We will do the best we can.

Mr. Cranston: I assure your Honor I am as anxious to get this concluded as anyone.

The Court: 10:00 o'clock tomorrow morning, gentlemen.

(Whereupon, at 4:40 o'clock p.m., Tuesday, March 2, an adjournment was taken until 10:00 o'clock a.m., Wednesday, March 3, 1954.)

Wednesday, March 3, 1954—10:00 A.M.

The Court: Proceed, gentlemen.

ADOLPH G. SUTRO

the plaintiff herein, having been heretofore duly sworn, resumed the stand and testified further as follows:

Redirect Examination (Continued)

The Court: Is there a question pending, Mrs. Zellner?

(The record was read by the reporter as follows):

“Q. (By Mr. Cranston): Mr. Sutro, do you have an opinion as to the rental value of your property during the years 1946 to 1953?

“A. I do.

“Q. On what is that opinion based?

“A. On conversations with landlords and tenants——.

“Q. In the neighborhood?

(Testimony of Adolph G. Sutro.)

“A. —renting comparable property in the neighborhood.

“Q. Will you state what investigation you made in this connection?

“A. You mean who I talked to, what was the conversation—or, would you tell me just what—

“Q. Yes, if you will state the investigation that you made, to whom you spoke, and what information you [1013] received.”

The Reporter: Then there was certain colloquy and objections.

The Court: The objection is overruled.

Mr. Abbott: Your Honor, may we have the notes to which the witness then referred marked for identification?

The Court: Are those the same notes that you exhibited yesterday?

The Witness: With the one addition—

The Court: You had better look at that.

(The document was handed to counsel.)

The Court: Yes, they will all be marked for identification, if there is nothing else in there excepting such as you are going to use now in testifying.

The Witness: Yes, your Honor.

The Court: Mark them.

The Clerk: Yes, your Honor. Defendant's Exhibit Z, for identification.

(The document referred to was marked Defendant's Exhibit Z for identification.)

(Testimony of Adolph G. Sutro.)

Mr. Cranston: I presume, your Honor, that the only part which is being marked for identification is the front of each of those pages. I notice there is writing on the back.

The Court: That is what I was trying to elicit.

The Witness: It is scratch paper. It has no bearing at [1014] all on the matter.

The Court: Did you look at that, Mr. Abbott?

Mr. Abbott: You are only using your own long-hand memoranda?

The Witness: Yes. The balance is just printed scratch paper.

Mr. Abbott: I will not bother looking at it, your Honor.

The Court: All right.

The Witness: On February 15, 1954, at 9:00 o'clock in the evening, I called on Mr. Joseph Alvarado, and his wife, at this home. Mr. Alvarado told me that he had rented hill land to the——

Mr. Abbott: Just a moment. We will object, your Honor. This answer is going beyond the scope of the question and the court's ruling.

The question was what investigation had been conducted, which, I take it, calls for a general statement of having talked with people. I don't think the question or the court's ruling with respect to our objection extends to the substance of conversations, the figures which were reported, and detailed data of that type. If it does, and is so understood, we would like to renew our objection on this ground, that the particular matter ascertained as a

(Testimony of Adolph G. Sutro.)

result of that investigation is hearsay, not within the expert opinion exception to the hearsay rule, and, therefore, objectionable. [1015]

The Court: I would think that is true. The ruling is somewhat of a departure from the previously adjudicated cases, which are mostly condemnation, however. I think in this case, which seems to be, at least to this date, with the exception of the Dalhite case, *sui juris*, and we are pioneering in a new line of adjective law, evidentiary law, that we want to extend these cases so that we are getting here a great number of witnesses, which will prolong the litigation and not to any advantageous result.

So I think the details of conversations are not material, and the ruling does not mean that those matters can be searched on the examination in chief.

The source of his information which led him, in addition to his own proprietorship status, ownership status, which may be or may not be to buttress his opinion, I think is proper, but the details I do not believe come within the scope of the ruling.

Mr. Weymann: May I urge, your Honor, a further reason for that objection, and that is emphasized in *Sharp v. United States*, that the source of this information is the opinion of people whom the defendant is unable to cross-examine to ascertain the extent of their knowledge, the scope of their knowledge, and their qualifications to express an opinion. That is a further reason.

(Testimony of Adolph G. Sutro.)

The Court: That would be true under the ruling as made, [1016] but if the ruling were the other way, of course, the process of this court would be available to the defendant to bring those people in, and that is another reason why I think it should be circumscribed. It would prolong these cases inordinately.

Q. (By Mr. Cranston): Very well. Mr. Sutro, I think within the court's ruling, you may state who Mr. Alvarado is, that is, is he a tenant or an owner of property in the neighborhood.

A. Mr. Alvarado at one time was manager of the Sonia Henie ranch.

The Court: That does not mean anything. Where is the Sonia Henie ranch? We don't care who the person is, whether it is the skater, or somebody else.

The Witness: It happens to be the skater, your Honor. The ranch is in the neighborhood of the San Luis Rey Valley, just a few miles from my own. Mr. Alvarado was the manager of the ranch, and in charge of the renting.

Shall I give dates?

Q. (By Mr. Cranston): I believe you can just give the general period, and the individuals whom you spoke to, and identify them as to their relationship to this property, or other property which was within this vicinity.

A. The information in regard to rentals which Mr. Alvarado gave me was based on the ones he had negotiated in [1017] 1946 and 1947.

(Testimony of Adolph G. Sutro.)

Mr. Abbott: Your Honor, I think this is going a little too far. As I understand the court's ruling, it is that the witness may identify the various people he contacted. Now we are getting into specific rentals periods and specific pieces of property.

The Court: I think the question related to a specific period, that it covered the period from 1946 on, did it not? Mr. Weymann, wasn't that it?

Mr. Weymann: I think it did.

The Court: I think he should have a right under the ruling to specify the period that the individual or entity from whom he sought information—the period that such information disclosed.

The Witness: Also, in the period 1949 and 1950 he occupied the position of landlord.

On February 16, 1954, at 2:45 p.m., I called on Mr. Jack Delphy at his office in Vista.

Mr. Abbott: May I ask how that name is spelled?

The Witness: D-e-l-p-h-y. He is a very large renter of property, Mr. Abbott. He gave me information regarding property he had rented in 1946, also in 1951 and '52, and in 1953. He also stated, as a governing factor on the rental which he obtained, that the water——

Mr. Abbott: We will object to this extension of the [1018] witness' testimony, your Honor.

The Court: I think you had better propound questions as to each of these phases.

Mr. Cranston: Very well.

(Testimony of Adolph G. Sutro.)

Q. (By Mr. Cranston): At this time I will simply ask you, Mr. Sutro, who was the next individual with whom you spoke, or any other individuals to whom you spoke?

A. I spoke to Mr. John Katzenbach, who told me regarding rentals he had received in 1948, 1949, and 1950.

Mr. Abbott: That name is spelled how?

The Witness: K-a-t-z-e-n-b-a-c-h.

Q. (By Mr. Cranston): Did you see anyone else?

A. Yes. On February 18, 1954, at 9:00 a.m., I saw Mr. Joe Murillo. He told me——

Q. Pardon me. Who is Mr. Murillo?

A. He is a tenant.

Q. Of property at what location?

A. Very close to my ranch; just the other side of Foss Lake.

The Court: Morrow?

The Witness: Murillo, M-u-r-i-l-l-o.

The Court: Oh, Murillo.

The Witness: Murillo. He told me he was a tenant in the period 1953—the three years previous would be 1952, 1951 and 1950. [1019]

Q. (By Mr. Cranston): By the way, I don't believe that you identified Mr. Katzenbach, as to his position.

A. Mr. Katzenbach was a landlord.

Q. And where was the land located?

A. That was located near Vista.

The Court: Near Vista in San Diego County?

(Testimony of Adolph G. Sutro.)

The Witness: Yes, your Honor.

Q. (By Mr. Cranston): To whom did you next speak?

A. On February 20th, oh, I returned to Mr. Delphy's office to ask him regarding another piece of property which he owned, and he gave me the rents he received as a landlord in 1949 and 1950, and also in '46, '47, '48, and '49.

Q. Where was this other piece of property located?

A. That was located at a place called Delphy Corners. It is not too far from Vista.

Q. Whom did you next see?

A. On February 20th, at 5:45 p.m., I called on a Mr. Ambrose De Bard, D-e B-a-r-d. He told me that as manager of a ranch he was renting land, and gave me the water costs, and the price received.

Q. For what purpose?

A. I called him back—there is a later note on that. I had overlooked obtaining the period on February 20th. I called him again on February 27, 1954, at 4:10 p.m. He said the period was from 1948 to date. [1020]

Q. Did you talk to anyone else?

A. Yes, on February 20, 1954, at 6:30 p.m., I visited Mr. Faustina Faucett at his residence.

Q. And where——

Mr. Weymann: Pardon me. May we have the spelling of that name?

The Witness: F-a-u-s-t-i-n-a, and the last name is F-a-u-c-e-t-t.

(Testimony of Adolph G. Sutro.)

Q. (By Mr. Cranston): And what position does Mr. Faucett hold?

A. Mr. Faucett holds the position of a landlord.

Q. Where is his property located?

A. It is located on the other side of Foss Lake, directly across from my ranch.

Q. What period of ownership did you discuss with him?

A. From 1946 to 1954. There was some discussion between Mr. Faucett and his wife as to the exact rentals, so the leases were produced for my inspection.

Q. As written leases?

A. As written leases.

Q. And you examined those personally?

A. I examined the leases personally?

Q. Did you talk to anyone else?

A. Yes. On February 21, 1954, at 11:30 a.m., I called on Mr. Jack Dunn at one of his [1021] ranches.

Q. And where is his ranch?

A. Mr. Dunn, at the time I called on him, was living near Vista. His position is that of a tenant. He gave me his current rental cost, and what the water rates were which he was paying. He also gave me the rental he was paying in association with a partner. That also was current. In addition, Mr. Dunn told me the rentals he had paid on another piece of property in 1947, 1948, and 1949.

(Testimony of Adolph G. Sutro.)

Q. Did you have any conversation with anyone else?

A. Yes. Some weeks ago Miss Whelan told me——

Q. Who is Miss Whelan?

A. She operates an adjacent dairy—that—may I mention the name of the tenant? Am I allowed to do that?

Q. I believe you may mention the tenant as long as you do not state the specific rent, within the court's ruling.

A. Told me that Clarence Nichizu had offered her a certain sum for the rental of 43 acres of land, and that he would probably be interested in renting 43 acres from me if I wished to do so.

Mr. Abbott: I will move to strike the last part of that answer as being without the scope of the court's ruling.

The Court: Yes, that may go out. That was not responsive.

Q. (By Mr. Cranston): Mr. Sutro, did you talk to anyone else, that is, in connection with rent values?

A. In chronological order, the next and final conversation [1022] was with Mr. De Bard, when I phoned back to ask him regarding the dates. I have already testified to that effect.

Q. Yes. Now, I believe this would be within the court's ruling: Can you state what was the lowest rental which was quoted in any conversation?

Mr. Abbott: Now, hold your answer, please.

(Testimony of Adolph G. Sutro.)

I believe that is without the scope of the court's ruling, your Honor, and we will object to it on that ground; and in addition to the grounds stated in our prior objection, that there has been no basis for comparability established. We don't even know which property is going to be described in the answer to the question propounded.

The Court: In one of the cases cited by Mr. Cranston—I think it was you who cited it—in one of the earlier arguments, *Givens v. Markall*, 51 Cal. App. 2d, 374, the California Appellate Court in deciding that question used this language:

“One whose real property is injured by another's wrongful and negligent act is entitled to such damages as will compensate him for the injury or loss sustained. No hard and fast rule can be laid down, however, for the measurement of these damages. Whatever rule is best suited to determine the amount of loss in the particular case should be adopted.”

Now, it is line with that pronouncement of the California Appellate Court, which is a procedural matter, and I presume would be applicable here in the absence of any superior Federal authority, that I do not believe that the details should be gone into. That is the point. The details of these things will in my judgment and in the court's discretion prolong this case unnecessarily, and perhaps result in no more secure basis for judgment than if it is excluded. I do not believe that we should go into the details.

(Testimony of Adolph G. Sutro.)

These are proper, because of the fact that they are elements of factors that the witness states he had in mind when he arrived at his opinion of rental value. Now, he hasn't given that opinion yet. When he does, then, if counsel on the other side want to go into those matters, they will have the right to search the situation, insofar as they desire to, having in mind, of course, the scope of the court's ruling.

Now, will you read the last question?

(Question read.)

The Court: Objection sustained.

Q. (By Mr. Cranston): Mr. Sutro, during your discussions with the individuals whom you have named, did you discuss the cost of water which these individuals were paying, or which their tenants were paying in the case of landlords?

A. Very definitely.

Q. In arriving at your opinion as to the value of your property, what factors have you borne in mind? [1024]

A. The comparability of the land, and the ratio of the water costs.

Q. Have you used the same figures for water consumption, computing the cost of water on your land and the value of your land, the rental value, as you used in computing the cost of the water on the lands of the individuals to whom you spoke?

A. No.

Mr. Abbott: We will object to that, your Honor.

(Testimony of Adolph G. Sutro.)

He hasn't shown any basis for computing the cost of water upon the lands of the persons with whom he conversed in this matter. He testified only that he inquired as to the water sources, which is something very different.

Mr. Cranston: If the court please, I would also like then to ask Mr. Sutro if he inquired, in addition to the source, as to the cost of the water on the other land.

The Witness: Definitely.

The Court: I will overrule the objection. I don't think it has very much probative force, however. It seems to me that we ought, if we can, to permit the court to hear the reasons that the witness formulated, which led him to give an expression of value, which he hasn't given yet, of course. This is merely the foundation for the giving of that opinion. But I am afraid we are getting out into divergent matters which will not have much tendency to either strengthen or [1025] weaken the opinion which he will give, but which would lead us into avenues of investigation which I do not believe were within the concept of Congress when they passed this Federal Tort Claims Act, as distinguished from other forms of litigation concerning the value of land.

Q. (By Mr. Cranston): Mr. Sutro, then bearing in mind what the court has said, what factors did you consider in arriving at your opinion as to the rental value of your land for the period from 1946 to the present time, or until 1953?

(Testimony of Adolph G. Sutro.)

A. The cost of water and the comparability of the crops raised.

Q. Was that in relation to other properties?

A. If I understand the question correctly, the comparison of the properties about which I inquired and my own were for the purpose of arriving at a value. I do not know if I understand your question correctly.

Q. Well, my question was that in determining the value to give to the cost of water on your property and the crops grown upon it, did you consider those factors on your property in relation to the same factors on the other properties that you had investigated?

A. Yes, with the exception of the allowance for water used.

Q. Will you explain that answer?

A. In figuring the water requirements on my own [1026] property, I figured four acre feet per season.

Q. Per acre?

A. Yes. As some of the properties about which I inquired had very high water costs, I reduced it in their case to two acre feet per season. In other words, I am using a factor of one-half of what I am allowing on my own property.

Q. In computing your own water costs, and in the figures which you have previously given, did you make allowance for the draw-down in your well, as shown on Exhibits 41 and 42 in evidence?

A. I made allowance for the draw-down in my

(Testimony of Adolph G. Sutro.)

well, but I do not recall the exhibits by those numbers.

Q. I will show them to you. Those are the notes which were taken from your book yesterday?

A. Those are copies of my well tests——

Q. Yes.

A. ——which show the draw-downs.

Q. And you made allowance for the draw-down as shown in these exhibits? A. Definitely.

Q. Mr. Sutro, based upon the reasons you have previously given, what is your opinion as to the rental value of your property for the years 1946 to the present time, assuming a supply of water which would be used for irrigating edible vegetables for human consumption? [1027]

Mr. Abbott: We will object to that, your Honor. The question goes beyond the scope of the court's ruling limiting the period for which we are measuring diminution of rental value. That period terminated in July, 1952.

Mr. Cranston: If the court please, I understood that at the last hearing the court indicated that he was at least open to further discussion at the proper time in this case. Now, if the court still adheres to its ruling, of course, the subsequent period would be out, but I think we should put it in now, so that if the court should change its ruling, it would be evidence upon which to act.

The Court: It is in, and the objection is sustained. I am not going to change the court's view

(Testimony of Adolph G. Sutro.)

as to the period at which the question of damages is to be estimated.

Mr. Cranston: Very well. Then we will limit the question to the period of 1952.

The Witness: From 1946—oh, may I ask if this presupposes the installation of an irrigation system?

Mr. Cranston: Presupposes the existence of an irrigation system adequate to water the land.

Mr. Abbott: I will object to that, unless counsel clarifies the question by indicating whether he is instructing the witness to assume the existing irrigating system, or some proposed irrigating system.

Mr. Cranston: On that, your Honor, we are assuming the [1028] existence of the irrigating system which Mr. Sutro is at all times anxious to construct, and would have constructed in 1946 but for the acts of the Government and, of course, the installation of the system in the year 1950 to water the additional acreage which had not previously been irrigated.

Mr. Abbott: Your Honor, this is having his cake and eating it too in this case. He wants damages for not having built the system, and he wants the system to be considered to be in place for the purpose of computing the diminution in rental value. Furthermore, there is no described system that the witness contemplated in 1946. The plans we have are the plans which were prepared in the fall of 1953.

Mr. Cranston: Of course, the witness has testi-

(Testimony of Adolph G. Sutro.)

fied as to the reason for not previously preparing the plans.

The Court: It goes back to the same basic point of difference between the litigants, and I am not sure at this time. Without indicating the measure which the court will ultimately adopt, I think perhaps the safer plan in the record would be to hear both aspects of it, as to time and as to prospective or accomplished improvements.

The court is very much inclined to adopt the conclusion, unless something develops in this case that has not appeared to this time, that as to these purely mental concepts it is rather a dangerous ruling to leave it in this broad field of *ex delicto* legislation, and to permit the alleged injured [1029] person to elicit mental concepts which haven't developed into accomplished situations. But I believe that perhaps to make the record as secure as it can be made in this court at this time, it would be well for the court to hear both aspects of that situation, in the light of the indications the court has just made as to what probably will be the ultimate factual conclusion of the court.

Mr. Cranston: Madam Reporter, will you read the question, then, which I believe can now be answered by the witness?

(The question was read as follows):

("Q. Mr. Sutro, based upon the reasons you have previously given, what is your opinion as to the rental value of your property for the years 1946 to the present time, assuming a

(Testimony of Adolph G. Sutro.)

supply of water which would be used for irrigating edible vegetables for human consumption?"")

The Court: I think that was modified later.

(The record was read further as follows):

"Mr. Cranston: Very well. Then we will limit the question to the period of 1952.

"The Witness: From 1946—oh, may I ask if this presupposes the installation of an irrigation system?

"Mr. Cranston: Presupposes the existence of an [1030] irrigation system adequate to water the land."")

The Witness: And the date is from 1946 to 1951, inclusive?

Mr. Cranston: To 1952.

The Witness: Oh, 1952, inclusive.

Mr. Abbott: Your Honor, we are still not certain, with deference to the court's ruling, as to which assumption is now being followed by the witness' testimony; whether this adequate system is a proposed system or an existing system.

The Court: I think the question should be a little more clear on that. It may be that the position will be taken that one of the witnesses' systems—Ikemi, I believe it was, who testified, the Japanese witness, whose name I have forgotten correctly—whether his system would be adequate. You used the term "adequate," and that is quite an elastic term to use.

(Testimony of Adolph G. Sutro.)

Q. (By Mr. Cranston): Mr. Sutro, will you assume the existence, then, for the purpose of your present answer, of a system such as you proposed to construct?

Mr. Abbott: For the record, may we note the objection interposed to the prior question?

The Court: The objection is overruled, as previously stated by the court.

The Witness: In that case I would estimate a fair rental for the year 1946 of \$70 an acre; for the year 1947, \$75 an acre; for the year 1948, \$85 an acre; from 1949 to date, \$100 [1031] an acre.

Mr. Abbott: We will move to strike the final phrase of that answer as not responsive, because it comes up to date, and that is not proper.

Q. (By Mr. Cranston): Would that be from 1949 to the conclusion of the period the court would consider?

A. Yes, I had my memorandum folded to 1952 here, and said "to date." It was done in error.

Q. That would apply to what portion, or how many acres of your ranch?

A. That would apply to approximately 97 and some-odd acres up to the period when the first well I drilled was tested, which I believe was December of 1950. After that time it would apply to 147 and a fraction acres, I believe.

Q. Would your opinion be different if the system used to irrigate the property were the system which had been installed and was on the property at the time you purchased it?

A. Yes.

(Testimony of Adolph G. Sutro.)

Q. Can you state an opinion as to the rental value of your property assuming the existence of that system?

A. I am not prepared to make a statement, as I have not had the time to study the factors involved which would enable me to come to an intelligent conclusion. This was something new to me, and I—— [1032]

Q. Mr. Sutro, turning now to the matter of the buildings upon the property, you heard Mr. Ikemi's testimony, I believe? A. Yes.

Q. When you purchased the property, was the residence building which he mentioned on the property? A. No.

Q. Was there any indication as to where it had been? A. Yes.

Q. What was the indication?

A. Some ashes.

Q. The building had then burned before you bought the property?

A. The indications were that it had.

Q. And in what condition was the barn which Mr. Ikemi mentioned?

A. That was badly infested with termites, and it was demolished.

Q. When was that done?

A. Immediately after the purchase of the property.

Q. In what condition were the other buildings?

A. Bad.

Q. What did you do to them?

(Testimony of Adolph G. Sutro.)

A. With the exception of one, which was worth salvaging for a sort of a shop construction office, why, they were [1033] demolished. They were not worth repairing.

Q. Did you prepare or have prepared plans for additional buildings on the property?

A. Yes.

Q. During what period of time were these plans prepared?

A. Immediately after the purchase of the property.

Mr. Cranston: I will ask that this be marked as our next exhibit for identification.

The Clerk: That will be Plaintiff's Exhibit 44 for identification.

Mr. Cranston: Your Honor, I have here this whole group of plans, all of which have been exhibited to counsel for the defendant. They have had them in their possession. Do you wish to have them introduced all as part of the same exhibit, or as separate exhibits? They relate to different buildings.

The Court: Probably if we take an initial number or letter, and then have a series. If they be numerals, a series of A, B, C, and so forth. If they be letters, then one, two, three, four.

Mr. Cranston: Then this would be 44-A, in that event.

The Clerk: 44-A, for identification, instead of just 44.

(Testimony of Adolph G. Sutro.)

(The document referred to was marked Plaintiff's Exhibit 44-A for [1034] identification.)

Q. (By Mr. Cranston): I show you a blueprint, and ask you what this represents.

A. That represents the implement shed.

Q. Where was this to be erected?

A. That was to be erected at the——

Mr. Abbott: We will object at this point, your Honor, on the grounds previously stated to all evidence relating to the intention of the witness as immaterial and irrelevant, and not a proper measure of damages in this case.

The Court: Overruled.

The Witness: This was to be erected on the farmstead.

Q. (By Mr. Cranston): And when was this plan prepared and by whom?

A. This plan was prepared early in 1946, under my directions, and drawn by a man who was working for me.

Q. Do you still intend to erect this building?

A. Yes, I do, but slightly larger.

Q. The size of the building is represented here as what? A. 46 by 21.

Q. You say you intend to erect a larger building? A. Yes.

Q. Otherwise, will you follow these plans?

Mr. Abbott: Your Honor, I don't know whether our understanding of the other day is still appli-

(Testimony of Adolph G. Sutro.)

cable in this session [1035] or not, but to save time, I would like to make a blanket objection to all of the testimony of the witness relating to his intentions in 1946 or any time prior to the present date, with respect to improvements to be constructed upon the property, on the grounds that it is hearsay, it is irrelevant and immaterial. And I will request a stipulation from counsel to the effect that that objection may be deemed interposed to this whole series of questions to which it will relate.

Mr. Cranston: Well, I will stipulate you need not object to each separate document, but it will be considered as a continuing objection.

Mr. Abbott: And to the various answers or questions propounded to the witness with respect to his plans, whether or not embraced within the document.

Mr. Cranston: Very well.

The Court: So understood.

The Clerk: The next exhibits are 44-B, 44-C, 44-D, 44-E, and 44-F, for identification.

(The documents referred to were marked Plaintiff's Exhibits 44-B to -F for identification.)

The Court: Now, before we proceed further, and for the purpose of expediting the case properly, insofar as it can be done, I understand from counsel that these blueprints, which have now been marked for identification, have heretofore [1036] been ex-

(Testimony of Adolph G. Sutro.)

hibited to Government counsel. Is that correct?

Mr. Abbott: Yes, your Honor.

The Court: And have you had an opportunity to make copies of them in some way?

Mr. Abbott: We were told that they were somewhat difficult to copy, and so our people looked at them for a short period, when they were in our possession, and then are continuing to examine them when Mr. Cranston's and the Court's convenience permits, and propose to do so even after they are admitted in evidence.

Mr. Cranston: Yes. Mr. Abbott had them for a period of a week or so sometime ago, and I believe you said you were unable to make copies of them at the time.

Mr. Abbott: I don't understand the technical reasons why, but we were advised it was difficult or impossible to reproduce them.

The Court: So that there have been no reproductions or copies in the hands of your expert until today?

Mr. Abbott: Well, our expert has viewed them, your Honor, but has not had reproductions made.

Mr. Cranston: In other words, Mr. Abbott has——

The Court: Has he been able to, or have you been able to submit to him delineations or drawings, which to him as an expert or an engineer or a draftsman will enable him to follow the testimony as it is given from the witness stand? [1037]

The reason I am asking is that some gentleman

(Testimony of Adolph G. Sutro.)

stood up here, as though he wanted to look at the blueprints. Now, if he has before him something that gives him what is impressed upon the blueprint, why, to save time, it would be better for him to stay where he is and to watch his copies or his delineations and follow the witness' testimony.

Mr. Abbott: He does not have that opportunity, your Honor, and I know it is a slight departure from usual procedure, but if he could be permitted to stand over here and view the drawings as the witness testifies, it would be a convenience.

The Court: So long as he remains silent, unless asked to speak.

Mr. Abbott: I think that he will.

The Court: And keeps his mental concept to himself until he is asked properly to take the stand to testify.

Mr. Abbott: I find that this gentleman never expresses himself unless asked for an opinion.

The Court: That is a very good rule, I think, even for the Court. It has not been adopted by the Court in this case very extensively, but maybe we can follow it from now on.

Mr. Cranston: I think the Court understands that counsel for the defendant has had these documents in his possession for a period of about a week, during which he was [1038] permitted to do anything he wished with them. There has been no effort to conceal them from him in the slightest.

Mr. Abbott: Oh, there was no such suggestion made by the Government.

(Testimony of Adolph G. Sutro.)

The Court: I didn't understand there was. I was just trying to speed up the case.

Q. (By Mr. Cranston): I show you now, Mr. Sutro, five additional blueprints, and ask you to what building these blueprints belong or appertain?

A. This one is from the shop. This is the shop. This is the shop. This is the shop. This is the shop. They are all from the shop.

Q. That is, all five of these documents I have just delivered to you are prints of a single building?

A. Yes.

Q. You refer to that as the shop. Now, I notice on the document which has been marked 44-D, that there are various rectangular markings on the portion to the left entitled "floor plan," one being the statement "drill press," one being the word "lathe," another "welding table," another "anvil," another "electric welding table, arc welder," and various other notations around the walls of the building, in the center of the building, and also a notation "electric panel board." What are indicated by these various words to which I have referred? [1039]

A. The placing of the various machine tools.

Q. Now, when were these plans which I have shown to you prepared? A. Early in 1946.

Q. And by whom?

A. Prepared under my supervision by one of my men.

Q. And was this building to be erected on your property in San Luis Rey? A. It was.

Q. What was the purpose of this building?

(Testimony of Adolph G. Sutro.)

A. At the time it was intended for the maintenance of the ranch equipment and some experimental work I was contemplating.

Q. Did that include experimental work in connection with farm machinery?

A. It did; but not limited to it.

Q. Yes. A. Yes.

Q. I notice that there are figures as well as words within these rectangular areas. What do the figures represent within these areas?

A. The approximate floor space necessary to position the various tools, in order that there would be no interference between them.

Q. Did you intend to purchase tools to fit those spaces? [1040]

A. Yes, approximately fit them.

Q. In 1946, at the time these prints were prepared, had you prepared a list of specific equipment that you would purchase?

A. The list was illustrated by the positions of the tools. The specific brand was not written down.

Q. Did you have specific brands or qualities of merchandise in mind? A. In some cases, yes.

Q. In general, what type of merchandise did you intend to purchase?

A. In general, medium quality.

Q. Since 1946 have you prepared a definite list of such equipment? A. Yes.

Q. For what purpose was this list prepared?

A. The list was prepared in order to permit an

(Testimony of Adolph G. Sutro.)

appraisal being made as to the 1946 cost of these tools, and the cost at the present time.

Q. Or in the years 1952 or 1953, as to the cost?

A. Yes.

Q. I show you certain documents and ask if these constitute the list of tools that you prepared?

A. Yes. [1041]

Mr. Cranston: I will ask that these be marked as the next portion of this exhibit.

The Clerk: That will be 44-G, for identification.

(The document referred to was marked Plaintiff's Exhibit 44-G for identification.)

Q. (By Mr. Cranston): Do these tools that are set forth on Exhibit 44-G, for identification, represent the same quality of tool and price range that you had expected to purchase in 1946?

Mr. Abbott: Your Honor, I think in addition to the standing objection, that we are now entering a field that is without the scope of the Court's ruling. We are talking about tools which the witness mentally planned to buy in 1946, and he refers to a list prepared quite recently as corroborative of that mental intention.

The Court: As I remember, the pleadings state the prospective provision for instrumentalities other than the structure, the building itself.

Mr. Cranston: Yes, the plans show definite tools. Every instrument referred to, every tool referred to on that list is indicated here.

The Court: But I am speaking of the pleadings

(Testimony of Adolph G. Sutro.)

themselves in the case. They did allege, as I remember—I am not sure about it now, unless you are, and that is the question—the pleadings allege that the claims for the damage were the [1042] resultant of the tortuous act of the Government in preventing the attainment, not only of the building itself, but of the equipment in the building for ranch purposes.

Mr. Abbott: Unless my recollection is in error, your Honor, I don't think the pleadings contain any reference whatsoever to any of this claim predicated upon increased cost of building structures. The pleadings are predicated upon loss of profits, silting and inundation of the land.

Mr. Cranston: I am inclined to agree with counsel, that the pleadings do not specify the precise manner in which the damage was created.

If the Court should believe that there need be any amendment, we will, of course, amend to conform to the proof, but the case has proceeded upon the theory, as set forth by Mr. McCall himself, at one stage of the hearing, that all that was necessary was to allege damage, and that whatever the damage was—whatever the damage that was sustained, it could be introduced without such an amendment to the pleadings.

I can refer to Mr. McCall's statement, if your Honor wishes. At that time we were considering a possible amendment of the pleadings, which he said would be unnecessary.

The Witness: May the witness say something, your Honor?

(Testimony of Adolph G. Sutro.)

The Court: No, I have just been looking to find something that is in the transcript here. [1043]

The Witness: I think it is at page 188, line 7.

The Court: I don't know that I am thinking of the same thing, or if I am looking at the right transcript. I don't know that I have that transcript here.

In the hearing before the Court on September 29, 1953, a part of your argument, Mr. Cranston, on page 99 of the transcript of that session was:

“The fact that Mr. Sutro was purchasing the property for commercial purposes, with the intention of using it for farming is shown by the facts, which would be introduced in evidence at any further hearing in the case; that since the decision reached by your Honor on the question of liability, that Mr. Sutro has actually started the construction of a repair and maintenance building for equipment, which is 2600 square feet on the main floor and 1600 square feet on the mezzanine floor. The foundations, piers, girders, joists, sub-floor are completed. That is all going up at the present time. The excavation for the foundation for the foreman's house has been started, and construction is to be commenced before the end of this week on a third building containing over 1200 square feet for an implement storage shed. In other words, once the issue of liability is determined, so that he felt in any degree safe in proceeding to put [1044] in the buildings necessary to farm the property, as he had originally intended to, he immediately took the

(Testimony of Adolph G. Sutro.)

steps in accordance with the plans which had been prepared in 1946."

Will you read the question, now?

(The question was read.)

The Court: Objection overruled.

The Witness: In general, yes, though cheaper ones have been specified in the list in at least one instance which occurs to me.

Q. (By Mr. Cranston): That is, the list now submitted contains at least one cheaper instrument than you had originally intended? A. Yes.

Q. Does it contain any more expensive?

A. No.

The Clerk: The next exhibit is 44-H, for identification.

Mr. Cranston: And can you number these while I am doing this? There is a series there.

The Clerk: And 44-I, for identification.

(The documents referred to were marked Plaintiff's Exhibits 44-H and 44-I, for identification.)

Q. (By Mr. Cranston): I show you now what has been marked 44-H, for identification, and ask you when this was prepared, and what it [1045] represents.

A. That was prepared early in 1946. It represents a runway for a traveling crane between the implement shed and the shop.

Q. And this was prepared by you, or under your

(Testimony of Adolph G. Sutro.)

supervision? A. Under my supervision.

Q. Do you still intend to use a traveling crane?

A. Yes.

Q. By the way, you have at least partially completed the work shop or repair shop indicated by the previous five exhibits; is that correct?

A. Yes.

Q. Were the plans which are represented by these documents followed in the construction of the work shop? A. Not implicitly.

Q. What changes were made, if any?

A. This alcove was temporarily eliminated, and the mezzanine floor of 1600 feet was installed, and the crane has been installed inside the shop.

Q. When you say "this alcove," you refer to a small annex 19 feet by 15 feet in size, as shown on the floor plan, Exhibit 44-E? A. Yes.

Q. And instead of that, what has been inserted in the building? [1046]

A. Well, the building has been framed so that this can be put on at any time.

Q. That part has not yet been built?

A. No, the building has just been framed to take care of it, but the mezzanine is a new development completely. And then, of course, the placing of the crane inside is a change.

Q. Are you making any charge against the Government for the additional cost of the mezzanine?

A. No, nor am I making any charge to the Government for the cost of the crane, because I owned the crane prior to 1946.

(Testimony of Adolph G. Sutro.)

The Clerk: With respect to this 44-I series, which is a group, I have also marked 44-I-1, 44-I-2, and 44-I-3, attached to 44-I, all for identification.

(The documents referred to were marked Plaintiff's Exhibits 44-I-1, 44-I-2, and 44-I-3 for identification.)

Q. (By Mr. Cranston): Mr. Sutro, I show you this group of blueprints marked Exhibits 44-I, 44-I-1, 44-I-2, and 44-I-3, and ask you what these blueprints represent?

A. These represent the plans for a residence.

Q. And when were these plans prepared?

A. Preliminary plans were prepared early in 1946.

Q. And when were these plans that are here prepared?

A. Well, with minor changes, they are the [1047] same.

Q. I note certain lines marked upon these plans in ink, or pencil of some kind. When were those markings placed upon the plans?

A. Those were also marked upon the plans as soon as they were received. Now, I can't tell you the exact date that this particular blueprint was received, but, as I said, there is practically no change from the preliminary. And these represent some of the girders, I believe, to be used in the framing. Yes, that is what they are.

Q. Had you actually commenced construction of your residence at the time you ascertained the

(Testimony of Adolph G. Sutro.)

pollution of the well? A. Yes.

Q. Do you still intend to construct a residence in accordance with these plans? A. Yes.

The Court: I think I can ascertain here something in the Court's mind. How many rooms were there in the proposed house?

The Witness: There were two bedrooms, a library, a dining room, and a kitchen, and a utility room, plus the cold storage facilities for the entire ranch.

The Court: All on one floor?

The Witness: All on one floor.

The Court: Now, this foundation plan, that is made [1048] sufficiently large to support additional floors, if it became necessary to build them?

The Witness: No. This was designed exclusively as a one-story structure, with no steps for people of advancing years.

The Court: And the occupant in that respect was to be your mother?

The Witness: And myself.

The Court: You do not consider yourself in that category, that is so far as years are concerned? I am not speaking about avoirdupois.

The Witness: I heard you tell the counsel not to argue with you yesterday, your Honor. I have nothing to say.

Mr. Cranston: Had you concluded, your Honor?

The Court: Yes, that is all I have.

Mr. Cranston: This should probably also be marked 44-I-4, since it also relates to the residence.

The Clerk: 44-I-4, for identification.

(Testimony of Adolph G. Sutro.)

(The document referred to was marked Plaintiff's Exhibit 44-I-4, for identification.)

Q. (By Mr. Cranston): I show you a series of papers marked Exhibit 44-I-4, for identification, and ask you what they represent.

A. Specifications for the residence.

Q. Which is represented by the three preceding documents? [1049] A. Yes.

Q. Were these specifications prepared for this specific residence in the year 1946?

A. Specifications were prepared. I do not think these particular ones were prepared at that date, because the specifications say "February, 1947," on them.

Q. That is, they say "January, 1947," on the particular specifications? A. Yes.

Q. The specifications were prepared in 1946?

A. Oh, yes.

Q. Do you have any prior specifications preceding those?

A. That happens to be the only copy I have. I can't find any more. We had to get that one back, I believe, from the Government.

Mr. Cranston: I guess this would be 44-J.

The Clerk: 44-J, for identification.

Mr. Cranston: And 44-J-1.

The Clerk: And 44-J-1, for identification.

(The documents referred to were marked Plaintiff's Exhibits 44-J and 44-J-1, for identification.)

(Testimony of Adolph G. Sutro.)

Q. (By Mr. Cranston): I show you two documents which have been marked 44-J and 44-J-1, for identification, and ask [1050] you what these represent?

A. Those represented emergency housing accommodations. They were specified as the guest house.

Q. When were these prepared, and by whom?

A. Early in 1946, and under my supervision.

Q. Do you still propose to erect this guest house?

A. Yes.

Q. Using these plans? A. Yes.

Mr. Cranston: This would be K, and K-1.

The Clerk: 44-K, and 44-K-1, for identification.

(The documents referred to were marked Plaintiff's Exhibits 44-K and 44-K-1, for identification.)

Q. (By Mr. Cranston): I show you two additional blueprints, marked 44-K, and 44-K-1, for identification, and ask you what these represent.

A. These represented the storage shed.

Q. And when were these plans prepared?

A. Early in 1946, under my supervision.

Q. Do you still intend to erect the storage shed?

A. Yes.

Q. Using these plans? A. Yes.

Mr. Cranston: 44-L.

The Clerk: 44-L, for identification. [1051]

(The document referred to was marked Plaintiff's Exhibit 44-L, for identification.)

(Testimony of Adolph G. Sutro.)

Q. (By Mr. Cranston): I show you Exhibit 44-L, for identification, and ask you what this represents, and when it was prepared.

A. That represents the help house. It was prepared early in 1946, under my supervision.

Q. And do you still intend to erect this house?

A. From these plans?

Q. Yes. A. No.

Q. What changes will be made?

A. Due to changes in social conditions, a more expensive home will be built.

Q. Are you making any charge against the Government, or filing any claim against them, for any additional cost by reason of the more expensive nature of the structure you propose to build?

A. No.

Q. Mr. Sutro, you have testified concerning plans for six different buildings. Was a wiring and inter-communication system designed for these buildings? A. Yes.

The Clerk: The next exhibit will be 44-M, for identification. [1052]

(The document referred to was marked Plaintiff's Exhibit 44-M, for identification.)

Q. (By Mr. Cranston): I show you Exhibit 44-M, for identification, and ask you what this represents.

A. That represents the very rough sketch of the underground wiring plan, where the transformers

(Testimony of Adolph G. Sutro.)

were located, the underground wires, and the inter-communicating system.

Q. Now, I notice certain areas which contain numbers. Can you identify these? What does No. 4 represent?

A. That represents house No. 4, the so-called guest house.

Q. And No. 3 represents?

A. The residence.

Q. What does No. 2 represent?

A. The shop.

Q. No. 1? A. The implement shed.

Q. And No. 5? A. The help house.

Q. And No. 6? A. The storage shed.

Q. Now, there are on this chart or map certain lines drawn with a red pencil, dotted lines. When were those lines placed upon this print or chart?

A. Early in 1946. [1053]

Q. And what do these red lines indicate?

A. The extent of the inter-communicating system, although apparently it was discussed at a later date, and it was extended here in a black line.

Q. That is, the line from building No. 3 to building No. 4 in black would represent a part of the "Voicall" system?

A. That is right. That is a part of the inter-communicating system.

Q. Is "Voicall" a trade name?

A. I believe it is a trade name.

Q. With the exception of the one pencil line marked "Voicall," from building No. 4 to building

(Testimony of Adolph G. Sutro.)

No. 3, what do the other pencil lines upon this exhibit indicate?

A. They represent the underground wiring system on the farmstead.

Q. And when were they placed upon this exhibit?

A. Oh, the lines were placed early in 1946. The fact that this one line is in black might have meant that when I checked the plan the boy did not have a red pencil in his pocket.

Q. Now, the area between buildings No. 3 and 2 on one side, and buildings 5 and 6 on the other, which contain certain dots, what does that represent?

A. This represented a small orchard. [1054]

The Court: Was the orchard growing at that time, or was it a prospective orchard?

The Witness: It was planted at that time, your Honor.

The Court: What kind of fruit was it?

The Witness: Miscellaneous. A few deciduous, and oranges, lemons, figs, apricots, and peaches.

The Clerk: The next exhibit is 44-N, for identification.

(The document referred to was marked Plaintiff's Exhibit 44-N, for identification.)

Q. (By Mr. Cranston): I show you Plaintiff's Exhibit 44-N, for identification, and ask you what this represents.

A. This represents the more detailed plan for

(Testimony of Adolph G. Sutro.)

the farmstead, showing the septic tank location, and the drainage pipes thereto, the sprinkling system for the orchard, and the fire protection system.

Q. At the time the other plans were prepared, did you contemplate constructing a septic tank for your residence?

A. I contemplated constructing the residence, and I would not know how to build one without attaching a septic tank thereto.

Q. Was this particular representation of the septic tank prepared in 1946, or at a later date?

A. It was prepared at a later date.

Q. When was this prepared?

A. It was prepared about the time the irrigation plan [1055] was prepared, which is already in evidence, I believe.

Q. The double red lines from buildings Nos. 4 and 3 represent septic drainpipe, is that correct—septic tank drainpipe? A. Yes, soil pipe.

Q. And the pencil lines in the orchard area in black pencil indicate what?

A. I will read the legend on this thing. Oh, they merely represent—you mean these lines?

Q. Yes, the lines at the bottom of the exhibit.

A. They represent short pieces of hose between the sprinklers.

Q. And the red lines in the orchard area between buildings 2 and 6 represent what?

A. Those represent the drainage system in the orchard.

(Testimony of Adolph G. Sutro.)

Q. And there appears to be just another septic tank line?

A. That is the septic tank line to house No. 5.

Q. Mr. Sutro, at the time you purchased the property, did you intend to operate it at a profit?

A. Definitely. A profit was necessary.

Q. Did you intend to grow vegetables on it?

A. Yes.

Q. Did you intend to purchase equipment necessary for that purpose? [1056] A. Yes.

Q. Did you prepare a list of such equipment in 1946? A. No.

Q. Why not?

A. I thought it would be too simple, when the time came to purchase it, to bother about making up the list right then.

Q. Have you prepared a list since then?

A. Yes.

The Clerk: This exhibit is 44-O, for identification.

(The document referred to was marked Plaintiff's Exhibit 44-O, for identification.)

Q. (By Mr. Cranston): I show you Exhibit 44-O, for identification, and ask you if this is the list of such equipment? A. That is——

Mr. Abbott: Your Honor, we will object at this point. This list appears to be of recent origin, and I think not only is objectionable for reasons stated in our standing objection, but also because it is without the scope of the Court's ruling.

The Court: May I see it?

(Testimony of Adolph G. Sutro.)

Mr. Abbott: This is not shop equipment of the type previously alluded to.

The Court: I don't recall any evidence as to the date [1057] of the preparation of this.

Mr. Cranston: No, I was going to ask that, your Honor.

The Court: Suppose you do it now. Then I will rule.

Q. (By Mr. Cranston): When was this list prepared, Mr. Sutro?

A. At the time that this septic tank was drawn in, and the irrigation system.

Q. That would be some time in the——

A. Subsequent to September of 1953.

Q. Some time in the fall of 1953? A. Yes.

The Court: I think that is within the objection. It will be sustained.

Mr. Abbott: Thank you, your Honor.

The Court: We will take a recess for a few minutes, gentlemen. There is a telephone message.

(A short recess.)

Mr. Cranston: Your Honor, might I be heard very briefly on your last ruling in regard to the farm equipment?

The Court: No, I think not. I am satisfied.

Mr. Cranston: Very well.

Q. (By Mr. Cranston): Mr. Sutro, you have testified previously concerning certain pumps to be used on your property, and the fact that you had prepared specifications in 1946, and had not been able to locate or reconstruct them; [1058] is that

(Testimony of Adolph G. Sutro.)

correct? A. That is correct.

Q. Did you subsequently prepare other plans and specifications for pumps subsequent to 1946?

A. Well, I prepared work sheets.

Q. What is involved in connection with the purchase of a pump?

A. The type of pump, the flow in gallons per minute, and the head against which it is to pump.

Q. Are specifications sent to pump manufacturers in such an event?

A. Yes, you usually request the manufacturer to quote you on a pump which will fit those specifications, and to please send you performance curves. I might change that to say performance curves are almost automatically included with the quotations.

Q. Did you prepare such plans and specifications and send them to various pump manufacturers at various times?

A. I prepared the data I mentioned, and have done so on many occasions.

Mr. Cranston: I will ask to have these documents marked as Exhibit 45-A, -B, -C, and so forth.

The Clerk: The next exhibit will be 45-A, for identification, 45-B, for identification, and 45-C, for identification, 45-D, for identification, and 45-E, for identification. [1059]

(The documents referred to were marked Plaintiff's Exhibits 45-A, to 45-E, inclusive, for identification.)

Q. (By Mr. Cranston): I show you the docu-

(Testimony of Adolph G. Suto.)

ments which have been marked Exhibits 45-A, -B, -C, -D, and -E, for identification, and ask you if these constitute a part of the correspondence which you have had with respect to the purchase of pumps? A. Yes.

Mr. Abbott: We will object to this line of inquiry. It appears the documents referred to were mailed to the plaintiff sometime in late 1949. Even assuming they would have some materiality if they constituted a transaction occurring in 1946, they certainly do not fall within the scope of the Court's ruling relating to the plans and specifications he had when he purchased the property, or shortly thereafter.

Mr. Cranston: If the Court please, if I might be heard on that: the witness has stated that he had prepared plans earlier, which he has misplaced and which he cannot discover; that this was a continuous course of conduct, and these are all, of course, prior to the instigation of this litigation.

The Court: These implements of agriculture, pumps and other equipment, don't they change from year to year; that there are improvements and changes in the patents, and so forth?

The Witness: The changes, your Honor, are minor as far [1060] as pumps are concerned.

The Court: I mean other equipment that would be used in farming activities or operations.

The Witness: Farming equipment is showing rapid changes.

The Court: Yes.

The Witness: Not pumps.

(Testimony of Adolph G. Sutro.)

The Court: For instance, motors, electric motors, aren't they modified and improved, or don't they progress from year to year?

The Witness: Probably slightly.

The Court: You think in the period from 1946 to 1952 there has not been much improvement along those lines of industry?

The Witness: In the particular—by the way, your Honor, that was merely a switch catalogue. The balance of them are pump inquiries.

In pumps and motors I do not think that any material improvement or material change has taken place. In other types of agricultural machinery, why, frequently changes have taken place.

The Court: Do you think it is possible for a man really to have had in mind in 1946 the specific equipment that the same type of a man would buy economically in 1952?

The Witness: Your Honor, it is perfectly feasible, and was done, to specify the output and the performance of pumps. [1061]

On the other equipment, equipment suitable for the production of crops in 1946 was in use. As of today there have been certain changes in this equipment, but the relative costs of construction, I would imagine, have changed but little. In other words, if somebody felt that on a hay chopper a hexagonal wheel in 1946 was a good way to press the hay on the apron, or whatever it is that brings it up, and in 1953 somebody had felt that a tentagonal wheel was more effective, the difference in cost of con-

(Testimony of Adolph G. Sutro.)

struction was nil, but the improvement in design might have been very great.

I would say that it is definitely possible to make a reasonable comparison in the cost of farm machinery between today and in 1946. If I did not feel it were possible, I would not have offered it in evidence.

The Court: I will overrule the objection. I think there have been a great many changes, and it is going to be rather difficult to evaluate the difference between the cost of certain agricultural implements—and I am speaking advisedly, from litigation—from 1946 to 1952, and that is the only phase of this question we are concerned with.

Mr. Cranston: Yes. Now, your Honor in the statement just made said “agricultural implements.” Do I understand that then refers to the farm equipment which has been ruled on before?

The Court: No, it does not. [1062]

Mr. Cranston: That refers then to the pumping equipment?

The Court: Yes, the last exhibits that I have inspected.

Mr. Cranston: Yes, the last exhibits. I did not know how broad the ruling “agricultural implements” was.

Q. (By Mr. Cranston): I call your attention, Mr. Sutro, to a letter which is contained in Exhibit 45-A, for identification, and ask if you had had conversations and correspondence with the Food Machinery and Chemical Corporation prior to the date of that letter?

(Testimony of Adolph G. Sutro.)

A. Yes, I did. I had had so much—I had asked them to submit so many different plans, I was finally ashamed to call them up any more; or so many quotations. The letter starts out, “It was a pleasure”——

Mr. Abbott: We will object to the reading of the letter.

The Witness: Excuse me.

Mr. Abbott: If it is to be introduced, it will be introduced as a document.

Mr. Cranston: Yes. Your Honor, I would like at this time, without introducing all of these pamphlets in evidence, to introduce in evidence this letter which constitutes a portion of Exhibit 45-A, for identification. I do not think that the catalogue and the specifications of the pump need be introduced.

The Court: They can be filed, for [1063] identification.

Mr. Cranston: Yes.

Mr. Abbott: We will tender the objection heretofore made, namely, that that is irrelevant, and has no proper bearing upon the measure of damages in this case; and a special objection addressed to this particular document, that it bears date of September 9, 1949, and as the Government understands the Court's ruling, the Court is concerned with plans and specifications prepared by the plaintiff at or about the time that he purchased the property. This appears to be a specification prepared by someone else more than three years hence.

(Testimony of Adolph G. Sutro.)

The Court: May I see the letter, please?

(The document was handed to the Court.)

Mr. Abbott: In addition to the grounds of objection we assert that this is hearsay, and also objectionable upon that ground.

Mr. Cranston: If the Court please, the receipt of the letter is an act, and is, of course, not hearsay.

The Court: It is just a copy that is here?

Mr. Cranston: Yes.

The Court: Overruled.

The Clerk: Did your Honor wish that marked specially?

The Court: I see no necessity of placing in the record as evidence these long-printed statements, which simply accumulate the expense of the record unnecessarily. But I think perhaps if they are referred to, they may be marked for [1064] identification specially, Mr. Clerk. In connection with this letter, which is received in evidence, the letter appears to be Exhibit 45-A, for identification.

The Clerk: Yes, your Honor.

The Court: And now it will be marked in evidence.

The Clerk: As 45-A-1?

The Court: Yes, I think so.

Mr. Cranston: No. That was simply 45-A, I believe.

The Clerk: Yes, for identification. Now you have a letter.

Mr. Cranston: That is right.

(Testimony of Adolph G. Sutro.)

(The document referred to, and marked Plaintiff's Exhibit 45-A-1, was received in evidence.)

Mr. Cranston: The other documents then will be simply noted as having been identified at the time that 45-A-1 was introduced in evidence?

The Court: That is right.

Mr. Cranston: Possibly to save further encumbering the record, I might read into the record the first sentence in another letter here, which was taken from Exhibit 45-E, for identification, directed to Mr. Sutro by the Byron Jackson Company.

Mr. Abbott: If your Honor please, if this is admissible at all, we will want the entire letter in the record.

The Court: What is the date? [1065]

Mr. Cranston: September 19, 1949, referring to a recent telephone conversation.

Mr. Abbott: We interpose the same objection that was interposed to the prior documentary offer, calling again the Court's attention to the date which this letter bears, namely, September 19, 1949.

The Court: Overruled.

Mr. Cranston: Then this entire letter will go into evidence?

The Court: Yes. He says he wants all of the letter in.

Mr. Cranston: That will be 45-E.

The Clerk: 45-E admitted into evidence.

(Testimony of Adolph G. Sutro.)

(The document referred to, and marked Plaintiff's Exhibit 45-E, was received in evidence.)

Q. (By Mr. Cranston): Mr. Sutro, have you prepared a list of pump requirements at the present time for your property? A. Yes.

Q. I show you a document and ask if this is the list? A. It is.

Mr. Cranston: Will you mark this as our next exhibit?

The Clerk: Yes. The next exhibit will be Plaintiff's Exhibit 46, for identification, or, rather, 46-A, for identification. [1066]

(The document referred to was marked Plaintiff's Exhibit 46-A, for identification.)

Q. (By Mr. Cranston): When was this list, which is marked Exhibit 46-A for identification, prepared, Mr. Sutro?

A. Since his Honor's ruling of last September.

Q. And it was prepared for what purpose?

A. It was prepared for the purpose of enabling an appraisal to be made as to the cost of these pumps in 1946 and as of today.

Q. Referring to the document, at the bottom of page 1 is a statement, "Pumps required No. 2"—

Mr. Abbott: We will object, your Honor, to this line of inquiry on the ground that this document is of recent origin, since the Court's ruling in September, is inconsistent with the two documents last received, and even if it were consistent,

(Testimony of Adolph G. Sutro.)

it would add nothing to them, if the Court is relying upon the dates in the earlier documents.

The Court: Objection sustained. What is the number of that, for identification?

Mr. Cranston: 46-A. If the Court please, at this time I would like to offer in evidence the blueprints which have been identified, beginning with Exhibit 44-A, and continuing through Exhibit 44-N, and the specifications for the residence which was marked Exhibit 44-I-4, for identification..

The Court: That does not include—— [1067]

Mr. Cranston: It does not include Exhibit 44-O, the typed list.

Mr. Abbott: Your Honor, we have a number of objections, some of which are general and apply to all of these documents, and then we have certain objections which are applicable only to selected documents in the group. If the Court planned a recess soon, I would be able to organize the documents with respect to the objections that are to be made during the noon recess. It is a rather cumbersome job, because some of these papers have particular characteristics that others don't.

The Court: Mr. Cranston, have you finished the examination on this line of inquiry as to equipment?

Mr. Cranston: No, your Honor. There was one other matter that I wished to inquire about. I don't know that I know what the Court's ruling is to be on it. I can proceed with a very few questions.

The Court: Is it a matter that will take an extended time?

Mr. Cranston: No, it will not take long.

The Court: We will suspend the ruling on that.

(Testimony of Adolph G. Sutro.)

Mr. Abbott: Thank you, your Honor.

Mr. Cranston: Will you mark this, please?

The Clerk: Plaintiff's Exhibit 47, for identification. [1068]

(The document referred to was marked Plaintiff's Exhibit 47, for identification.)

Q. (By Mr. Cranston): Mr. Sutro, at the time you purchased the property, did you intend to grow vegetables on the entire area, or only part of it?

A. Only part of it. The entire area was not suitable for vegetables.

Q. To what use did you intend to put the balance of the property? A. Grazing.

Q. And in general, what portion of the property was to be used for grazing?

A. In general, that portion of the property which was too steep for vegetable growing.

Q. Would the use of that part for grazing, and the use of the balance for vegetable growing, require the installation of any type of equipment?

A. Yes, it would require fences and gates.

Q. For what purpose?

A. To keep the cattle out of the vegetables.

Q. Did you prepare a plan in 1946 for the fencing of the property? A. No.

Q. Why not?

A. I can't conceive of preparing a plan of how to [1069] build a fence. It would seem to me you

(Testimony of Adolph G. Sutro.)

would just go out and build it without drawing up a plan.

Q. Have you prepared a plan for proposed fencing of the property during the year 1953?

A. Yes.

Q. I show you Exhibit 47, for identification, and ask if this is such a plan?

A. Yes, this is the plan.

Q. Will you state what the green line upon the chart or diagram indicates?

Mr. Abbott: This probably is the appropriate time for the Government to interpose its objection. I wanted counsel to be able to lay his foundation. However, we seem to be getting into the substance of the exhibit in the matter. Once again, this is a document of recent origin, your Honor, and there has been no objective manifestation whatsoever of an intention to fence this area whatsoever. This plan, as I recall, contains about 25,000 feet of fencing, with nothing in the record at all to indicate objectively the witness' intention in the year 1946.

Mr. Cranston: Might I point out that the witness has testified as to why there would have been nothing put down on paper, that it was not common practice to do so. It would appear that if you intend to have cattle and vegetables on the same property, a fence is as essential as the feed for [1070] the cattle. You would not make a diagram of the feed that you were going to feed the cattle, but it would be essential. It is something that you could not operate properly without.

(Testimony of Adolph G. Sutro.)

So if Mr. Sutro is to be made whole for the loss he sustained, this fence is definitely one item of his loss, and the reason why it was not put down is apparently as has been testified to by the witness.

The Court: Which fence is one item of the loss?

Mr. Cranston: The fence necessary to keep the cattle in.

The Court: I don't think so. If any fence is an element to be considered in estimating the damage, it must be the fence that was proposed and conjectured and in the mind of the owner at the time he acquired the property.

Now, we are presented with a plan which is delineated—it is not in the concept of the owner—it is delineated on a piece of paper, and I presume it will be attempted to be followed by certain specifications as to the type of fence, when there is nothing in the record to show that that was the type of fence, or was the fence that was in the mind of the owner at the time that he acquired the property.

Mr. Cranston: Well, if the Court would permit Mr. Sutro, I believe he can establish the facts.

The Court: No. I will permit you. You can argue the law in the case. He is only a witness.

Mr. Cranston: I mean, I think he can establish the fact [1071] that this fence was in his mind.

The Court: You ask the question, if you want to.

Mr. Cranston: I am asking if I may be permitted to do that.

The Court: Yes, if you think it is of any value after the Court's statement.

(Testimony of Adolph G. Sutro.)

Q. (By Mr. Cranston): Mr. Sutro, I will ask you, did you intend in 1946 to construct a fence?

Mr. Abbott: Well, we, for the record, interpose the objection that the witness' mental state in the year 1946 is not relevant or material.

The Witness: Yes, I intended to construct fences on the ranch.

Q. (By Mr. Cranston): Does this plan portray on paper the fences which you intended to construct at that time?

A. That plan portrays on paper the fences which would be necessary to utilize the land for cattle and vegetables.

Q. Is it the fence which you intended in 1946?

Mr. Abbott: The same objection, your Honor.

The Witness: I had not made any drawings of the fence in 1946, and would not have done so. Unless it were for this suit, I would have gone out and built the fence.

The Court: How can you say now, Mr. Sutro—you are getting into an argumentative position, and this is the only way I can get at what is in counsel's mind in offering evidence [1072] of this type, even with the broad concept of this law—how can you say now, in 1954, that in 1946 you would have placed on this specific portion of that property the specific fence that you have delineated and that you expect to follow up by further specifications.

The Witness: Your Honor, to me it appears elemental in its simplicity. First, the type of fence would be the type of fence as used in the neighbor-

(Testimony of Adolph G. Sutro.)

hood, the more or less accepted type of fence. I had no ideas of putting in some special fence. This is the customary farm fence.

In regard to the areas covered, why, it is merely covering the area which is not devoted to or which is not suitable for truck farming.

The Court: What material of fencing did you have in mind in 1946?

The Witness: The customary barbed wire and steel post.

The Court: Barbed wire and steel posts. Don't you know there are many of these areas that are set apart for grazing where they have wood fences?

The Witness: Yes, your Honor. I have sold wood fence posts.

The Court: Then how can you say, without any recordation of your concept in 1946, how can you say in March of 1954, that you had this fence that is delineated here on this piece of paper in [1073] mind?

The Witness: Very simply, your Honor. When I purchased the ranch, a Mr. Theodore Wackerman, one of the most successful farmers in the Valley, assisted me in going over it, and the subject of the fencing came up. I had come more or less, we will say, from the neighborhood where redwood was more prevalent and had quite a usage as fence posts, and I mentioned the predominance of steel posts in the neighborhood, and he said they were the only thing to use down there, because in the event of a grass fire, your fence was not destroyed.

(Testimony of Adolph G. Sutro.)

It just happens that I can make that statement with authority.

The Court: I will sustain the objection. Is that all there was to this fencing?

Mr. Cranston: Yes, I think so.

The Court: I wanted to get to that point before the noon recess.

Now, you will devote the noon hour to looking these over, as I understand it?

Mr. Abbott: I will, your Honor. I will attempt to have them organized. Will they be available during the noon hour?

The Court: They certainly will be available when you want them.

Mr. Abbott: I had assumed the courtroom was locked.

The Court: And if your opponents want to be present, [1074] they may. At what time do you want to look at them?

Mr. Abbott: I would like to come in at about 1:30, your Honor.

The Court: We will have someone here at 1:30.

Mr. Abbott: Thank you.

The Court: Very well. 2:00 o'clock, gentlemen.

(Whereupon a recess was taken at 12:20 o'clock p.m., March 3, 1954, until 2:00 o'clock p.m., of the same date.) [1075]

Wednesday, March 3, 1954, 2:00 P.M.

The Court: Proceed, gentlemen.

ADOLPH G. SUTRO

the witness on the stand at the time of recess, resumed the stand and testified further as follows:

Redirect Examination

(Continued)

Mr. Cranston: Would your Honor wish to make any ruling on the offer previously made, of introducing of different blueprints in evidence?

Mr. Abbott: We are prepared to state our objection, your Honor, if we may.

The Court: Yes.

Mr. Abbott: First, with respect to all of the documents, we object to their admission in evidence because they are irrelevant and immaterial, because they contain and constitute hearsay evidence not within any exception to the hearsay rule.

Now, particular documents appear to be without the scope of the Court's earlier rulings in the matter, and will be discussed individually.

In the latter category, the first is Plaintiff's Exhibit 44-O, for identification, which consists——

Mr. Cranston: Pardon me, Mr. Abbott. That was not even offered in evidence. [1076]

Mr. Abbott: Well, it ended up on my table, and I assumed it was.

Mr. Cranston: But it is in for identification.

Mr. Abbott: Yes, but it was with the documents that were handed to me.

(Testimony of Adolph G. Sutro.)

Let me ask the same question, then, with respect to 46-A, which was a list of pumps.

Mr. Cranston: That was not included.

Mr. Abbott: That was not included. Finally, the fencing map, was that included in that offer?

Mr. Cranston: That was not included in that offer.

Mr. Abbott: All right. That will dispose of one class of documentary evidence.

The second group consists of the two charts, Exhibits 44-M and 44-N. Each of those charts contains lines and material added, according to plaintiff's testimony, to the chart subsequent to 1946, and, in fact, within the last few months, and, therefore, the charts and the material so added appear to be without the scope of the Court's prior ruling.

Mr. Cranston: If the Court please, the document, 44-M, the witness testified all the lines on that chart were placed on it in 1946.

Mr. Abbott: Is that M or N, counsel?

Mr. Cranston: That is M, the wiring system.

Mr. Abbott: Is my recollection of the record correct [1077] with respect to -N, that certain lines were added thereto in recent months?

Mr. Cranston: Yes, your recollection is correct that the witness stated that the lines to the septic tank were added in recent months, but that a septic tank had been contemplated as a part of the residence in 1946.

The Court: The objection is overruled in toto. They will be received and marked filed as exhibits.

(Testimony of Adolph G. Sutro.)

The Clerk: Your Honor, for my record, that is Exhibits 44-A to 44-N, inclusive?

The Court: Now, Mr. Abbott, is the clerk correct in that?

Mr. Abbott: No, your Honor. The specific objections have only been interposed with respect to 44-M and -N.

The Clerk: Oh.

Mr. Abbott: We have not disposed of other specific objections.

The next offer was 44-G, which is a list of tools and equipment, which in the witness' testimony were described as items indicated upon a chart prepared in 1946, namely, plaintiff's 44-D, for identification. However, on careful inspection of the list, we find that the majority of items there appearing are items of tools, small tools, accessories, equipment, which in nowise appear on the chart prepared in 1946, and, therefore, fall in the same category as the offer [1078] or the exhibit identified, but not offered, relating to miscellaneous items of farm equipment. We feel that this list of equipment, in so far as it contains items other than the items appearing on the chart prepared in 1946, is within the scope of the Court's other ruling.

The Court: Of course, I haven't the instruments here. Do you agree that the list containing items in Exhibit 44-G are in no way delineated or represented upon the blueprint, which I haven't before me and can't tell you what the exhibits are?

Mr. Cranston: No, your Honor. It is my under-

(Testimony of Adolph G. Sutro.)

standing that this list refers to items which are listed on the exhibit. Now, I believe that there may be certain details set forth in that list, which details do not show in the exhibit. The witness can probably answer your Honor's question exactly as to any difference there may be between the two. I would not feel competent to do so.

Mr. Abbott: I think this is the general nature of the problem, your Honor. On the exhibit an item such as a lathe will appear, and then in the list of tools we find all sorts of items which are used in conjunction with a lathe, hand tools, and so forth, things which are auxiliary to the use of the lathe, but which are in no way reflected on the chart prepared in 1946.

The Court: Mr. Sutro, have you heard the inquiry? [1079]

The Witness: I have.

The Court: What is the situation with respect to it?

The Witness: The situation is, your Honor, that you cannot run a lathe unless you have a chuck.

The Court: I think that is self-evident. But is this the situation: that the only reason that the list, which is Exhibit 44-G for identification, is offered in connection with or in reference to Exhibit 44-D, for identification, is because it is obvious to anyone intelligibly looking at the blueprint and seeing thereon noted a lathe, that the accompanying instrumentalities would perhaps necessarily be re-

(Testimony of Adolph G. Sutro.)

quired to be attached in order that the lathe function?

The Witness: They are essential, your Honor. I do not think there are any hand tools in that list.

The Court: I haven't examined it. The objection will be overruled.

Mr. Abbott: Your Honor, with respect to the chart the Court is now viewing, which is 44-D, and all other charts relating to the shop building, which include 44-G, 44-E, 44-H, 44-D, and 44-F, there is the additional objection that the Court's ruling on September 29, 1953, at page 111, beginning at the middle of line 9 and running to the middle of line 11, is in part as follows:

"If there is an increase in the cost of buildings that were necessary to do the job, I think the [1080] additional cost over the estimate which he has, as indicated by the plans, drawings, and specifications, is a measure of damages in this case."

This shop, from the testimony of the witness and from an examination of the plans which he presents, is far from being an agricultural installation. The witness says it was an experimental shop in part, and surely the Court after examining the many, many items of power tools, items of equipment necessary for shaping metal and performing similar functions, will conclude that that was not a shop and not equipment needed to do the job, to perform a farming operation. They represent a hobby and perhaps an experimental shop; perhaps the sort of thing that a gentleman farmer might

(Testimony of Adolph G. Sutro.)

want for his own amusement, and have no reasonable relation to the economic endeavor of growing vegetables or any other crop. On that additional ground we object to the exhibits last described.

The Court: Without indicating any weight to be given to the proffer, the objection is overruled.

The Clerk: For the record, may I have those exhibit numbers again, please? My record shows that 44-D and 44-G have been admitted in evidence.

Mr. Abbott: I believe that would also include -B, -C, -E, -F, and -H, all relating to the shop.

The Clerk: -B, -C, E, -F, and -H?

Mr. Abbott: According to my records, [1081] yes.

Well, what I have read as -G and looks like -G may be -B. Can you identify it, Mr. Clerk?

The Clerk: This is 44-C, and that is 44-H. Wait a minute. Excuse me. That is 44-D; 44-C and 44-D. 44-C and -D in evidence.

The Court: Wait a moment, Mr. Abbott.

Mr. Abbott: Yes, your Honor.

The Court: The clerk has not got the record.

The Clerk: I think I have the record now, your Honor.

The Court: Of all of the blueprints?

The Clerk: Of all in evidence, yes.

Mr. Cranston: My notations are——

The Court: We will have Mrs. Zellner read the record. Now, all of these blueprints that are now before you, Mr. Clerk, have been identified?

The Clerk: Yes, your Honor.

(Testimony of Adolph G. Sutro.)

The Court: And I presume they are marked in sequence alphabetically?

The Clerk: Yes, your Honor.

The Court: Now, whatever they are, they are all received in evidence, and the objection is overruled as to that.

The Clerk: Yes, your Honor. That is 44-B, 44-C, 44-D, 44-E, 44-F, 44-G, and 44-H in evidence.

The Court: So ordered. [1082]

(The blueprints heretofore marked Plaintiff's Exhibits Nos. 44-B, 44-C, 44-D, 44-E, 44-F, 44-G, and 44-H for identification, were received in evidence.

Mr. Abbott: Your Honor, the next group of documents consist of documents relating to two residence structures. First, a group of blueprints relating to the residence marked Plaintiff's 44-I, for identification, the specifications for the residence marked 44-I-4, and a plan for the guest house marked 44-J. With respect to those documents we have the additional objection that the documents relate to residential structures, and, therefore, are in no manner or sense to be considered in computing the damages relative to the alleged commercial operation contemplated by the plaintiff.

Now, we have a second objection to those plans, and also to all of the remaining plans, consisting of 44-J-1, 44-A, and 44-K and 44-L, the latter group relating to certain other structures, namely, that both the residence structures and the group of

(Testimony of Adolph G. Sutro.)

structures last identified have not been commenced, no work has begun, and the Court's ruling of September 29, as the Government understands it, is a ruling that the structures in progress, as described by Mr. Cranston, would be the structures to be considered by the Court, not structures which have never been begun even to this day.

The Court: Now, let's see what the Court said on page 111, commencing with line 7 of the transcript of September [1083] 29, 1953:

"Now, whatever he spent, whatever he has to spend now or after the nuisance was abated, in other words, after the water was not contaminated by this noxious effluent, if there is an increase in the cost of the buildings that were necessary to do the job, I think the additional cost over the estimate which he has, as indicated by the plans, drawings and specifications, is the measure of damages in the case. I think they are part of the detriment that has been caused by reason of the negligent acts of the government officers in not removing this contaminating effluent from the stream of Pilgrim Creek."

I think that is sufficiently broad to cover the proffers and the objection is overruled.

(The documents heretofore marked Plaintiff's Exhibits Nos. 44-A, 44-I, 44-I-4, 44-J-1, 44-K and 44-L for identification, were received in evidence.)

Mr. Abbott: May I call the Court's attention to

(Testimony of Adolph G. Sutro.)

another part of the record in that hearing?

First, I would call the Court's attention to that portion of the record of September 29th which was read by the Court this morning, which had some bearing upon this point, and I know it is in the Court's mind, but there is a separate [1084] remark of the Court very close to the end of the record.

The Court: Upon what page?

Mr. Abbott: I am just reaching for it now. It is page 117, beginning with line 17:

"Mr. McCall: May it please the Court, might I ask one question? I didn't quite understand as to the item of increase in building costs. I don't know that I know exactly what that refers to. I would like to ask——

"The Court: It refers to matters that Mr. Cranston stated had been in process of construction.

"Mr. McCall: That is the——

"The Court: I don't mean to say that unless the case is going to be tried immediately that additional facilities would be included within the statement of the Court. I think he would be entitled to show the increase in the cost of buildings and appurtenances that he has plans for, or has made contracts concerning, or anything of that character.

"Mr. McCall: That would include any type of improvement, or would it be limited to that which had to do with the condition of water or the handling of water? [1085]

"The Court: It would be in connection with farming activities, husbandry. It wouldn't relate

(Testimony of Adolph G. Sutro.)

to the house, for instance, the residence, and so on."

I have gone on reading past the point which I wanted to emphasize, because, in fairness, the latter statements are not quite as close to the point as the Government is now seeking to assert, but I do feel that the Court's one remark on page 117, at lines 21 and 22, are the specific answers to the point now under discussion, and, incidentally, the remarks on page 118 seem to be applicable to the residence structures as well.

The Court: The ruling will stand.

Mr. Cranston: Do I understand, then, your Honor, that the blueprints as to all the buildings which have now been introduced in evidence are received, or was that merely as to certain ones that Mr. Abbott has referred to?

The Court: It refers to those that have been mentioned by Mr. Abbott, and that have been ruled upon. They haven't been before me, and I am not going to spend the Court's time in doing work which should have been done by the attorneys. It refers to those instruments that counsel has referred to, and which he has referred to by number, for identification.

Mr. Abbott: To the best of my knowledge, your Honor, I at this time have referred to the entire offer. If I have [1086] failed to do so, it is through inadvertence. Is there any document not referred to?

Mr. Cranston: I believe you did not refer to 44-K-1, and I would simply ask that the offer into

(Testimony of Adolph G. Sutro.)

evidence be admitted for all documents in this series.

The Court: What is 44-K-1?

Mr. Cranston: It is a part of the storage shed, your Honor. There were two prints of the storage shed, and I believe you only referred to 44-K in your objection.

Mr. Abbott: I appreciate your calling that to my attention, and would like to extend the objection to include the document last described by counsel.

The Court: The objection will be overruled in toto as to all of the series which counsel has expressly discussed and mentioned in his objection.

Mr. Cranston: And the offer that was made, will then be—that is, the documents included in the offer, as to any which he did not object to will also be admitted in evidence?

The Court: Of course, if they have been offered and have not been objected to, they will be received.

The Clerk: Your Honor, may I ask a question? With respect to 44-I-4, for identification, a series of papers, specifications for a residence, that was not referred to, was it?

Mr. Cranston: Yes, that was referred to. [1087]

Mr. Abbott: I would like to mention that my objection began with a general objection to the entire offer, your Honor, followed by certain specific objections.

The Court: The court understands that the Government objected to everything, and its ruling has

(Testimony of Adolph G. Sutro.)

been made in accordance with its understanding, and the clerk will ascertain what that is by looking at the exhibits at such time as he has convenience, not during the session of the court.

Q. (By Mr. Cranston): Mr. Sutro, I show you two additional documents, and ask you what these documents represent.

A. One represents a day reservoir located at the top of the mesa. The other one represents a day reservoir located at Camp Pendleton Highway.

Q. When were these particular documents prepared?

A. They were prepared by the Soil Conservation Service on November 5, 1953.

Q. Had you had conversations with the Soil Conservation officials prior to 1953? A. Yes.

Q. Are those the conversations concerning which you testified and Mr. Tedford testified on the first day of this trial? A. Yes.

Mr. Cranston: I would ask to have these marked for identification as our next exhibits. I believe they would [1088] be 48 and 48-A.

The Clerk: 48 and 48-A, both for identification.

(The documents referred to were marked Plaintiff's Exhibits Nos. 48 and 48-A, for identification.)

The Court: Now, I want to refresh the court's recollection on that. Mr. Cranston, were either of these proffered exhibits, for identification, placed before Mr. Tedford?

(Testimony of Adolph G. Sutro.)

Mr. Cranston: These documents were not placed before Mr. Tedford, no. That is correct.

Mr. Tedford testified that he had had conversations in 1946 with Mr. Sutro, and Mr. Sutro testified to the same effect, but Mr. Tedford did not state that he had seen these documents.

The Court: I think we will proceed, and explore the reason why they were not produced at that time.

Mr. Cranston: Yes.

Q. (By Mr. Cranston): Now, Mr. Sutro, during the course of your conversations from time to time with the Soil Conservation authorities, was the location of the reservoirs changed, or did it remain the same as during your first conversations with them in 1946?

Mr. Abbott: I will object to that as assuming a fact not in evidence, namely, that there was a location of reservoirs, or even that there were specific reservoirs. That question assumes a certain degree of detail and specification [1089] which has nowhere appeared in the record.

The Court: Overruled.

The Witness: The locations were changed.

Q. (By Mr. Cranston): When were they changed?

A. I do not remember the exact date.

Q. Can you fix it with any degree of accuracy?

A. Well, the new theory of location of the reservoirs was discussed perhaps a year after the original discussion. Instead of putting a reservoir on the top of a hill and pumping all the water not only to the

(Testimony of Adolph G. Sutro.)

highest elevation, but above the highest elevation, I wanted to put the reservoir on the side of the hill, so that my pumping costs would be lower, and feed the highest part of the land, or be able to feed the highest part of the land only when the reservoir was full.

The Court: Wait a minute.

The Witness: Yes, excuse me, your Honor.

The Court: You were asked about the time, the date.

The Witness: It was within a year; say, in '47.

The Court: Was it before September of 1952?

The Witness: Oh, certainly.

The Court: Well, certainly. I don't know.

The Witness: Excuse me, your Honor. I apologize.

The Court: Proceed.

Q. (By Mr. Cranston): The change was made, then, some time in the year 1947? [1090]

A. As close as I can recall the date.

Q. And has there been any change in the location of the reservoirs since some time in 1947?

A. Now, in order not to mislead the court, the socalled road reservoir was designed and contemplated after the new well made the irrigation of that section of the ranch a practical matter.

Q. And that is the reservoir which is illustrated on No. 48, for identification? A. Yes.

Q. And the mesa reservoir is on 48-A, for identification? A. Yes.

Q. So 48-A was the one which had been discussed in 1946 to 1947? A. Yes.

(Testimony of Adolph G. Sutro.)

Q. And 48 was first discussed when?

A. When the new well came in; in '50, or rather, I should say '51, because the well did not come in until late in 1950. It was December, if my memory is correct.

Mr. Cranston: We will offer these documents in evidence, your Honor.

Mr. Abbott: To which we object, your Honor, on the ground that, in addition to their immateriality and irrelevancy, in the Government's view of the law of damages [1091] applicable to the case, they are without the scope of the court's rulings fixing damages, because they were prepared in late 1953. For the further reason, that the one document more particularly described by the witness represents a state of mind which the witness did not even achieve until late 1950.

Mr. Cranston: Of course, as to the last objection the well which made the reservoir necessary was not dug until 1950.

The Court: I will overrule the objection.

The Clerk: 48 and 48-A admitted into evidence.

(The documents heretofore marked Plaintiff's Exhibits 48 and 48-A, for identification, were received in evidence.)

Q. (By Mr. Cranston): Mr. Sutro, I believe on the first day of the trial you testified in connection with Exhibit 39, and stated what the blue lines and the red lines upon this exhibit represented, but that

(Testimony of Adolph G. Sutro.)

you did not at that time testify specifically to what the green lines represented.

A. The green lines represented pipe which would have been installed prior to the time of the bringing in of the well in December of 1950, which made it unnecessary to use those connections under this plan.

Q. That is, after the discovery of the other wells, it became unnecessary to install these particular sections which are marked in green, so that your present plans would [1092] not install that pipe?

A. That is correct.

Q. And in the claim which you make at the present time against the Government, are you crediting the Government with the cost which would have been incurred if those pipes had been installed in 1946?

A. The Government is being credited with that cost.

The Court: In your question, Mr. Cranston, you spoke about the discovery of other wells. Did you mean the location of this third well, so-called?

Mr. Cranston: I meant the location of, I believe it was, the second well, the second and the third wells. You see, when Mr. Sutro bought the property, there was one well, plus the pump that was in the bed of Pilgrim Creek, and then there were later two additional wells dug, as a result of which Mr. Sutro—maybe I shouldn't say this, but I believe he has testified to it—did not intend to pump from Pilgrim Creek, so that the cost of the pipeline to connect to that, is excluded from our calculations, and in our calculations is credited to the Government as an off-

(Testimony of Adolph G. Sutro.)

set, because we do not have to now spend that money.

The Court: What misled the court was the use of the word "discovery."

Mr. Cranston: That was a very loose term.

The Court: I wanted to understand what you meant is [1093] all.

Mr. Cranston: If the court please, I believe that concludes our direct examination of Mr. Sutro upon this phase of the case.

Now, he has incurred certain out-of-pocket expenses as a result of the acts of the government. We have his books here in court, and we also have a summary statement. It will take a considerable period of time if we try to go into the matter of those expenses here in court.

I am wondering whether the court would wish us to endeavor to consult with opposing counsel as to any of those items, or whether, if counsel cannot agree, the court on that phase of the case would care to have an accountant examine the books and advise the court as to the results of his investigation, as to what items he might deem proper, either after having heard rulings of the court before his investigation or afterwards.

We are ready to follow whatever procedure the court wishes to expedite the matter.

The Court: Maybe I can direct an inquiry to you which may be helpful. Are those so-called out-of-pocket expenditures such as Mr. Sutro enumerated when he said he came down from San Francisco, and went back and forth, and so forth?

(Testimony of Adolph G. Sutro.)

Mr. Cranston: That is a part of the expense; the expense which he incurred in going from San Francisco to San [1094] Luis Rey, as a result of not being able to live upon the premises. A part of the expenses would represent labor charges for the care and maintenance of the property and its use for dry farming. A part would represent the expenditures which he made for seeds, sprays, fertilizer, spraying weeds, and so forth, erosion control, depreciation on equipment on the property, the rental which he was obliged to pay for the storage of equipment, electricity, and other expenses.

Now, as I say, we can go into them in as much detail as the court desires, because his books are here. It would be a lengthy process if we itemize them, however.

The Court: I don't want the court to be put in the position of controlling the way litigants present their cases, or directing the presentation, in civil litigation particularly. I don't know what the Government's attitude is going to be on such a matter, whether they are going to rest upon their general objection, that the plaintiff has no right of recovery at all, or whether there is some specific objection to that line of evidence.

Mr. Abbott: I know nothing more about the evidence that is to be presented, your Honor, than we have just heard from Mr. Cranston, but, in the opinion of the Government, the items there enumerated are not properly recoverable in an action of this character, even assuming liability; so that our ob-

(Testimony of Adolph G. Sutro.)

jection would go, in particular, to the evidentiary problem [1095] or substantive problem of what damages are recoverable by way of mitigation. Are traveling expenses recoverable, are the costs incident to growing the crop the proceeds of which have been received by the plaintiff recoverable, and so forth, with respect to each class of items?

Mr. Cranston: Possibly, your Honor, I could ask the witness to testify as to the nature of the expenditures in certain classifications, without going into detail as to how many dollars were involved, or the specific events, and your Honor might then be able to make a ruling, and if the ruling is favorable, we could then possibly work out a solution on the exact number of dollars.

The Court: Of course, Mr. Abbott was not present at the hearing in San Diego, and naturally, he doesn't know what occurred there and what Mr. Sutro testified to there. The court does have a recollection as to what occurred there, and what he testified to concerning the matters under discussion.

I don't believe those matters are allowable in this action. They fall in the same category as his claim for interest, and some other claims that have been asserted.

Just to assign one reason, and not to assign it for the purpose of provoking argument on it: Living was pretty good in San Diego. It might not have been as pleasurable to a San Franciscan as San Francisco, but it was a pretty good place in which to live, and I don't think that in an action [1096] of

(Testimony of Adolph G. Sutro.)

this kind, when a man chooses to live in a place where he has lived most of his life, because he has to continue to do that and come back and forth, that the tortfeasor should be mulcted as to such additional costs. We would have to get into his method of living, and I don't believe that is a proper matter in these cases, and if the evidence is offered, and it is offered properly, and it is objected to properly, I shall sustain the objection.

Mr. Cranston: Your Honor, for the sake of the record I would like to ask Mr. Sutro certain questions as to expenses which he incurred.

The Court: Why don't you make an offer of proof, instead of asking him, because it will take up time in cross-examining him, and all of that.

Mr. Cranston: Yes.

The Court: I am not criticizing counsel for wanting to cross-examine, because I think it is his duty to do so, but what I am trying to do is to expedite the trial with security and reasonable effort.

Mr. Cranston: If the court please, then at this time the plaintiff offers to prove through the witness now on the stand, the plaintiff himself, that during the period from January 17, 1946, to the date of the trial, the plaintiff has incurred expenses in the following amounts:

Supervision of work done upon the property which resulted [1097] in no benefit to the plaintiff of a permanent nature, \$170;

Labor, discing and spraying, which likewise resulted in no permanent benefit, \$3,571.92;

(Testimony of Adolph G. Sutro.)

Farm labor, resulting in no benefit to the property of permanence, \$2,722.19;

For seed, sprays, and fertilizers, spent for erosion control, not for permanent benefit, \$441.87;

For fees for accountants and legal fees not connected with this litigation, but attorneys employed in prosecution of rights involving Pilgrim Creek prior to this litigation, \$820.63;

Depreciation of equipment, \$4,772.60;

Depreciation on automobiles and trucks, \$3,013.73;

Auto and truck maintenance, \$600.99;

Electric bills upon the premises, stand-by charges, and so forth, \$95.43;

Repairs to the equipment on the premises, maintenance and supplies, \$691.68;

Rental of equipment, \$881.47;

Telephone and telegraph, \$455.05;

The rent of a warehouse in which to store goods which would otherwise have been stored within the buildings contemplated and set forth in these plans, \$2,440;

Insurance on premises, that is, not on the buildings on the premises, but other insurance, [1098] \$417.61;

Traveling expenses of \$15,977.66;

Petty cash expenditures of \$300;

Or a total of \$37,382.85.

That does not include many additional charges which the plaintiff has sustained but which we do not wish to press.

Mr. Abbott: At this time the Government objects

(Testimony of Adolph G. Sutro.)

to the offer of proof on the ground that the evidence tendered is irrelevant, incompetent and immaterial, that it does not constitute evidence of damages recoverable under the Tort Claims Act, and that there has been no proper foundation laid for such evidence as evidence in mitigation of damages, or otherwise.

The Court: The objection to the offer will be sustained.

Mr. Cranston: That I believe concludes the present examination of Mr. Sutro.

In order that I might determine when to have our next witness available, Mr. Abbott, could you advise me whether you believe you will take the afternoon for cross-examination?

Mr. Abbott: It seems more likely than not.

Mr. Cranston: That is, I can call the witness, but I hate to call him here and have him sit if he will not be needed.

Mr. Abbott: That is, considering not only cross, but your redirect. [1099]

Cross-Examination

By Mr. Abbott:

Q. Mr. Sutro, in your direct examination you gave the court your opinion with respect to the rental value of the ranch owned by you during the years 1946 through 1952, and in expressing that opinion you assumed a pure water source. Now, were you also assuming and expressing that opinion that the pure water source consisted in part of pure water flowing from sewage disposal plants 1 and 2?

(Testimony of Adolph G. Sutro.)

A. I do not understand your question, Mr. Abbott.

Q. Well, let me see if I can clarify it. In expressing your opinion, did you assume that there was pure water flowing in Pilgrim Creek during the years in question, but that that pure water came in whole or in part from sewage disposal plants 1 and 2? A. No.

Q. Your opinion then was based upon the assumption that there was no water in Pilgrim Creek coming from either sewage disposal plants?

A. That is correct.

Q. Have you leased the property during the years 1946 through 1952, Mr. Sutro?

A. Partially, or occasionally. I don't quite know the word to use.

Q. Well, now, I think you testified that an important [1100] factor in your estimate of rental value was the availability of water for use on the premises at minimum expense. During the period of January, 1946, through November, 1950, what was the source of that water which you considered in forming your opinion?

A. The well which was on the place at the time of purchase, plus the record of the creek production during the ownership of Mr. Ikemi.

Q. And what was the production of the well in terms of gallons per minute?

A. The production of the well was estimated at 300 gallons a minute on tests. To be exact, I believe

(Testimony of Adolph G. Sutro.)

it was 296 gallons a minute. It was practically 300, to all intents and purposes.

Q. And what was the yield which you assumed to be available from Pilgrim Creek in terms of gallons per minute?

A. If my recollection is correct, it was 225 gallons.

Q. Making a total of approximately 425 gallons per minute of water available, Mr. Sutro?

A. No. You asked me what—if my memory is correct—what the test of the well showed, or what it would produce, and I told you in round numbers 300 gallons a minute. That with 225 gallons from Pilgrim Creek would be——

Q. I stand corrected. 525 gallons per minute?

A. Yes, Mr. Abbott. [1101]

Q. Now, are you aware of the source of water employed by your neighbor, Mr. Zanhiser?

A. Somewhat.

Q. And are you familiar with artesian wells on his property?

A. I have never made an investigation of his property, Mr. Abbott.

Q. Well, do you know offhand whether or not there are artesian wells there?

A. I believe Mr. Zanhiser testified under oath at one time that he had one that produced 75 gallons a minute.

Q. And that artesian well is located within a few hundred feet of the northeasterly boundary of your property, is it not?

A. No.

(Testimony of Adolph G. Sutro.)

Q. Where is it located with respect to your property?

A. It is located some hundreds of feet from the southeasterly boundary.

Q. Approximately how far?

A. I never measured.

Q. Isn't it a fact that Mr. Zanhiser has more than one well in that area? A. Yes.

Q. When did you first lease the premises for agricultural purposes? [1102]

A. I do not remember offhand.

Q. Do you have records with you which will refresh your recollection?

A. I believe I have records. I also think it is a matter of record in the transcript of this case.

Q. Well, if you have a record available which will refresh your memory, please refer to it.

The Witness: May I leave the stand, your Honor?

The Court: Yes.

The Witness: Would you have the question read?

Mr. Abbott: The reporter will read it to you.

(The question referred to was read as follows: "Q. When did you first lease the premises for agricultural purposes?")

The Witness: During the year 1948. Or may I change that? I cannot tell you the year I rented it. I can tell you the year I received the income.

(Testimony of Adolph G. Sutro.)

Q. Well, can't you fix the approximate date that the leasing commenced?

A. No. Well, if the court would like me to take the time, I can probably go through my records and see at what date the income was deposited. This merely shows it as income received during the year 1948. It does not show the date of the bank deposit.

Q. Did you lease the property pursuant to a written [1103] instrument of any type?

A. I only recall one instance of a written instrument. It was produced in court, and shows a cancellation clause in order that we could proceed with the improvement of the ranch as soon as the Navy went ahead with the current plan.

Q. Was the first leasing pursuant to a written instrument? A. No, I do not think so.

Q. If it was an oral lease, what was its term?

A. The term for a portion of the ranch was 25 per cent of the crop.

Q. By "term," I mean what period did it cover—one year, two years?

A. One year. I thought you said "terms," not "term."

Q. Did you receive the rent at the approximate expiration date of that one-year oral lease?

A. I am unable to answer that question. I received the rent, but I cannot tell you as to the exact time from memory.

Q. Did the lease begin any time in the year 1946?

A. No, I do not think it did. I think the lease began in 1947.

(Testimony of Adolph G. Sutro.)

Q. And what was the crop to be grown pursuant to that percentage type lease?

A. Sudan grass. [1104]

Q. And what time of the year do you plant Sudan grass?

A. If I remember correctly, it was planted in the spring of—excuse me. Are you asking me at what time of the year is Sudan grass planted—

Q. That is the question.

A. —or at what time was it planted on my ranch?

Q. Suppose you answer both questions.

A. I am not qualified to testify as a farmer.

Q. With respect to the latter question, what time of the year was it in fact planted on your ranch?

A. I believe in the spring of 1947.

Q. And your arrangement of leasing had been consummated prior to the time the crop had been put in?

A. Naturally, yes.

Q. How many acres were so planted?

A. That part of the bottom land which had not been rendered useless by alkali or underbrush, brush which had overgrown the land, etc.

Q. How many acres were planted, Mr. Sutro?

A. I do not know. I said that part of the bottom land on which it was capable to plant the Sudan grass.

Q. Was it 90 acres?

A. I would doubt it. I can say no without even giving that question much thought.

Mr. Abbott: May I have Exhibit 33, please? That is [1105] that large map with the red lines on it.

(Testimony of Adolph G. Sutro.)

It won't be a blueprint. It will be a white paper map.

(The document was handed to counsel.)

Q. (By Mr. Abbott): Calling your attention now to Plaintiff's Exhibit 32, which contains some areas delineated in red, was the Sudan grass crop you have described planted in the area marked 1?

A. Yes, in portions of the area marked 1.

Q. It was not planted in all of 1? A. No.

Q. How much of 1 contained that Sudan grass area, marking, if you will, with a pencil the area in Section 1 which was so planted?

A. I would be unable to do so, Mr. Abbott, because I testified the area which was not planted was the area which was alkaline, covered with underbrush, and growth.

Q. Mr. Sutro, you are a very intelligent man. Didn't you, in making arrangements with your tenant or in viewing the crop in which you had an interest, ever form an estimate as to the acreage planted?

A. No, I only formed an estimate as to the tonnage received when I got the scale weight.

Q. Was any of the Sudan grass planted in area No. 6 on the chart we are viewing?

A. To the best of my recollection, it was planted in a [1106] portion of that piece.

Q. Was any of it in area No. 5?

A. Yes. That is where some of the finest of the Sudan grass was raised.

(Testimony of Adolph G. Sutro.)

Q. Was all of area No. 5 planted to Sudan grass?

A. I would say a very large part, because there was not much undergrowth, and it was up above the area which had been affected by alkali.

Q. Was area No. 4 planted to Sudan grass?

A. Yes.

Q. All of it?

A. Yes, that field was in fairly good shape, as I recall.

Q. Were there any other areas on the chart you are now viewing which were planted with Sudan grass?

A. I believe you have asked me about this area, this area, this area, and this area (indicating). Is that correct?

Q. It is.

A. I do not recall any other areas.

Q. Was the total acreage more or less than 50 acres?

A. Mr. Abbott. I am sorry, I am not able to make intelligent estimates of land measurements by inspection.

Q. Did the tenants make any representations to you as to the acreage which would be planted with Sudan grass? [1107]

A. The only recollection I have is that the tonnage was unbelievably high. I believe, in fact, we still have some samples of some of it which was 10 feet high in something like, I believe, 12 weeks. I would also like to check that statement in case you wish to go into detail.

(Testimony of Adolph G. Sutro.)

Q. How long was the Sudan grass on the land?

A. That was about the length of time.

Q. About 12 weeks?

A. That is my recollection.

Q. I believe you testified that you did receive records of the gross production of that crop?

A. Yes. I was paid on a tonnage basis.

Q. Do you have those records with you today?

A. No. No, I wouldn't have those records with me, I don't think. No, I wouldn't have the scale weights at this late date.

Q. Do you have them at any place, not necessarily in this courtroom, but are they in your possession at any point?

A. Well, as it is not my habit usually to throw away papers, unless they are memoranda in my own writing, they are probably in existence somewhere, but I don't know where.

Mr. Abbott: Well, I had better stop at this point. Mr. Cranston, my understanding was that all original records relative to crop production would be produced at this hearing. [1108]

Mr. Cranston: We have the records as to the receipts, the gross receipts that Mr. Sutro obtained, and as to how many tons were represented by that many dollars, I do not believe that we have the records. I thought that your inquiry was as to the number of dollars received.

Mr. Abbott: Perhaps there was a misunderstanding on that point.

(Testimony of Adolph G. Sutro.)

Q. (By Mr. Abbott): Mr. Sutro, are those records at your home in San Francisco?

A. Mr. Abbott, I have no home. They are stored somewhere in San Diego County, and, frankly, and I am not trying to avoid the question, I don't know where they are.

Q. Do you have an independent recollection of the yield?

A. With the exception that it was considered very heavy, that photographs of the yield were taken and published in one of the farm journals, I cannot tell you the yield in tons per acre. In fact, it should be—it is self-evident I can't, because if I don't know the acreage, why, the total tonnage of the hay would not mean much in relation to tons per acre.

Q. Well, do you know what the total tonnage was?

A. No. I said I did not have the weighing slips with me, and——

Q. The question was directed to your independent recollection, [1109] Mr. Sutro.

A. Yes. I can tell you how much cash I got.

Q. How much cash did you get?

A. In 1948 I received \$2,686.60 for my percentage of the hay crop.

Q. By hay, you mean Sudan grass?

A. Yes, yes.

Q. Now, if the first lease was an oral lease for one year, and the Sudan grass was on the land for the period of weeks described by you, were there any

(Testimony of Adolph G. Sutro.)

other crops planted during that period of leasing?

A. Not to my recollection.

Q. Were there subsequent leases of the property. A. Yes.

Q. What was the effective date of the next lease?

A. Well, I suppose there was a lease for the year 1948.

Q. And was it effective on the first day of that year?

A. I have no independent recollection as to that being the case or not being the case. I am merely assuming that it was a January to January lease.

Q. Was that lease oral or written, Mr. Sutro?

A. I believe that was the only written lease, because it was my desire to have a cancellation clause in the lease, so that I could proceed with the improvement of the ranch, the current plan of the Navy being believed to be imminent. [1110]

Q. Do you have that lease with you today?

A. I believe it is a matter of record in this transcript.

The Court: I think it was, and I was trying to find it, but I couldn't find it in the record. But that does not mean it is not there.

Mr. Cranston: It was at least referred to, and I thought it was introduced in evidence, but my recollection may be faulty in that, too.

Mr. Abbott: I did not pick it up in reading that transcript, but there is a lot of detail in it, so I could have missed it.

(Testimony of Adolph G. Sutro.)

Q. (By Mr. Abbott): In any event, do you have that document here today?

A. No, I do not.

Q. By the way, in the first lease for purposes of Sudan grass, were cattle grazed upon the area upon which the grass was grown after the grass was cut? A. Yes.

Q. How many cattle?

A. I don't recall, but I believe in the first part of the case I estimated that 200 head had grazed there, and subsequent investigation leads me to think that statement was approximately correct.

Q. Whose cattle were those? [1111]

A. They either belonged to the Whelan Dairy, or to Rex McDaniel.

Q. And what compensation did you receive for that privilege of grazing cattle on the land?

A. \$366.25.

Q. Was that a gross figure? Did that include the total compensation for all the cattle?

A. Yes.

Q. By the way, are you referring to an original record, Mr. Sutro?

A. No, it is not an original record.

Q. Are the original records here today?

Mr. Cranston: Yes, they are here.

Mr. Abbott: May we have them?

Mr. Cranston: Mr. Sutro, will you give them to Mr. Weymann for his inspection?

(The documents referred to were handed to counsel.)

(Testimony of Adolph G. Sutro.)

Q. (By Mr. Abbott): Now, Mr. Sutro, did the sum of \$2680.60, which you have testified to, received on the Sudan grass, represent a one-quarter share of the product, or did it represent a cash settlement not based on a one-quarter share?

A. No, that was a one-quarter share.

Q. Did you receive anything else of value in consideration for the leasing in the year 1947, in addition to the [1112] two things you have already mentioned?

A. No.

Mr. Abbott: Now, you testified that in the year 1948 there was a second lease. You think it was in writing. And I will now inquire if counsel has been able to find that document.

Mr. Cranston: We haven't. We didn't know you wanted it until now, and I have not found it during the court session this afternoon.

Q. (By Mr. Abbott): Who was the lessee on that lease?

A. Rex McDaniel.

The Court: Let me look through that again. I think that was mentioned in the San Diego hearing.

Mr. Cranston: I know it was mentioned.

Mr. Abbott: I recall it being mentioned, your Honor, but I do not recall the lease.

The Court: No, I could not find it either. I looked for it just casually here. Proceed.

Mr. Abbott: Is there a pending question?

(The record was read.)

Q. (By Mr. Abbott): Who was the lessee named in that lease?

A. Rex McDaniel.

(Testimony of Adolph G. Sutro.)

Q. And did the lease specify the crop to be grown by the lessee? [1113]

A. Oh, no. No, I can testify to that, it did not specify the crop.

Q. Was that a cash rental or a percentage type lease?

A. That was a percentage type lease.

Q. What crop was in fact grown by Mr. McDaniel?

A. My recollection is that the crop grown was oats and barley.

Q. How many acres of each?

A. I cannot answer that question. The same conditions applied as to the former crop.

Q. Can you form any estimate as to the acreage planted in oats, Mr. Sutro?

A. I cannot.

Q. Have you any estimate as to the acreage planted in barley?

A. No, because I forget which areas were planted to which.

Q. Then do you have an estimate as to the total acreage planted to both crops?

A. No. I gave you my reason earlier.

Q. Were you on the ranch frequently when those crops were being grown?

A. I would say that I had been down there at intervals, rather frequent, because I believed that the situation with the Navy was showing—we thought was going to come to [1114] a conclusion.

Q. In negotiating for the lease on a percentage

(Testimony of Adolph G. Sutro.)

type arrangement, did Mr. McDaniel represent the approximate acreage he would plant?

A. No.

Q. And you didn't inquire when you were negotiating how many acres he would plant?

A. Well, he would plant anything that he could get a crop from. In other words, anything that was not overgrown or salted out by alkali.

Q. When he was reporting on the yield of the crop to you, did he make any representation as to the acreage planted?

A. No, merely the tonnage.

Q. What was the tonnage of barley?

A. That, as I said, I do not have the scale slips; only the income.

Q. Do you have any record of the tonnage of the oats? A. No, only the cash received.

Now, excuse me. I received duplicate weight slips from a public weigher, but I do not have them here, and I am not sure I can lay my hands on them.

Q. Who was that public weigher?

A. Some of them were from Boyle & Company's public scale in Vista. I do not recall if they all went over that public scale. [1115]

Q. Was that lease on a 25 per cent share basis?

A. Yes.

Q. What was the amount received by you from the proceeds of the barley crop?

A. I cannot give you that. The proceeds of both crops were lumped in together.

(Testimony of Adolph G. Sutro.)

Q. And what was that total?

A. That was \$176.85. The expense of irrigating from the sewage in the creek for the Sudan had been so great that Mr. McDaniel felt the only way he could come out would be to put in a dry farm crop, and, if I remember correctly, I think there may have been a water shortage that year, because apparently the crop was a trifle scant.

Q. What was the reason for the high expense in irrigating from Pilgrim, Mr. Sutro?

A. The same problem that confronted us from the day we bought the ranch, to put in a properly designed efficient system, with no assurance that it would not have to be removed, destroyed, sold, was not warranted by the prospects. Therefore, a Rube Goldberg contraption was rigged up in an attempt to pump the water out of the creek, and the cost of the operation was in excess of the potential income.

Q. Did you receive anything else by way of consideration from Mr. McDaniel in exchange for the leasing of the land in the year 1948? [1116]

A. Well, somewhere in here is—I don't know what year it is—I received some income from Mr. McDaniel which does not appear in my books as income.

Q. How does it appear on your books?

A. It does not appear in my books.

Q. What did it consist of? A. A check.

Q. For how much? A. \$117.

Q. And what did that represent?

(Testimony of Adolph G. Sutro.)

A. That represented, I believe, pasture land.

Q. Did you receive any part of this 1948 crop of oats and barley in kind?

A. Somewhere in here I received, I think it was the first crop, part of the Sudan crop that Mr. McDaniel stored on his place and was going to sell mine when he sold his. Then, if I recall it, he sold his—no, he used his, and sold mine or bought mine at a later date. That was the nearest I came to being the owner of a crop.

The Court: I think we will suspend now for a few minutes; five or ten minutes.

(A short recess.)

The Court: Proceed, Mr. Abbott.

Q. (By Mr. Abbott): Mr. Sutro, at the period just prior to the recess you had testified to receiving a part of [1117] the 1947 crop in kind, and storing it with Mr. McDaniel, and that it was eventually sold? A. Yes.

Q. Are the proceeds of the sale of that part of the crop that you received in kind included in the \$2680 figure you have testified to?

A. I cannot say, because I forget when it was sold. It is, however, entered in the books as income.

Q. At what point? I will give you your original records, if that will help.

A. It probably won't, but I will attempt to do my best.

(The books were handed to the witness.)

The Witness: I cannot identify which particu-

(Testimony of Adolph G. Sutro.)

lar item it was. These are my income receipts, and it shows how many tons or pounds of hay it was for, but which particular ton of hay was the one which Mr. McDaniel had on his ranch does not show on the books.

Q. (By Mr. Abbott): Well, the question we are concerned with at the present time is whether the proceeds of the sale of that part of the crop received in kind are included in the figure of \$2686.60 which appeared on your books, and which you have previously testified to.

A. Well, I am unable to answer that question. It appears on the books. Where, I do not [1118] know.

Q. Did you prepare and file an income tax return for that year?

A. Do I prepare an income tax return? Or do I file an income tax return?

The Court: He said, "Did you."

The Witness: Did I prepare—I can't balance a checkbook. Mr. Abbott. I did not prepare my return myself.

Q. (By Mr. Abbott): Then you have an accountant or a bookkeeper who keeps these records for you, Mr. Sutro?

A. Yes, Mr. Abbott.

Q. What is his name?

A. My auditor's name was Nedbal.

Q. Does he have possession of records which will tell us whether or not the part of the crop you received in kind is included in this figure you have testified to?

(Testimony of Adolph G. Sutro.)

A. You mean, would he have records and be able to identify which bale of hay was included in which particular dollar that was received?

Q. That wasn't the question, Mr. Sutro.

A. Well, I am trying to reduce it——

Mr. Abbott: The reporter will read it back, and then if it is not clear, I will attempt to clarify it.

(Question read.)

A. No.

Q. (By Mr. Abbott): This particular ledger which you [1119] have before you, and which has been referred to as an original record, is that something that you maintained, Mr. Sutro?

A. I post a ledger?

Q. Yes.

A. I can't find an account in a ledger.

The Court: I didn't hear that answer.

The Witness: I said I couldn't find an account in a ledger.

Q. (By Mr. Abbott): You recall being served, through your counsel, with requests for admissions in this case, and with interrogatories, Mr. Sutro?

A. Yes, Mr. Abbott.

Q. And some of those interrogatories required of you a statement of the rental income of the property during the years in question?

A. Yes, Mr. Abbott.

Q. And you signed and swore to the accuracy of the answers to those interrogatories, did you not? A. I did.

(Testimony of Adolph G. Sutro.)

Q. And what information did you use in completing the interrogatories?

A. The statement that the auditor got up.

Q. What percentage of your total share of the crop did you receive in kind for the year 1947?

A. Well, one year, and I don't know which one it was, [1120] my entire percentage was taken over to Mr. McDaniel's other ranch, and when it was sold, I got the income.

Q. You mean that in 1947 your entire share was delivered to you in kind and stored on Mr. McDaniel's ranch?

A. I said I wasn't sure of the year.

Q. Now, focusing on 1947, was only a part of your share received in kind?

A. That I can't answer.

Mr. Abbott: Your Honor, I apologize to the court for the time that this examination takes.

The Court: That is all right. We will do the best we can.

Q. (By Mr. Abbott): Can you recall which year it was that you received your entire share in kind, Mr. Sutro?

A. Well, my only recollection—I am sorry, Mr. Abbott. I assure you I am not trying to evade the question. You merely have picked on this subject on which my knowledge is absolutely nil. It would be to the effect that it was probably the first year the Sudan was grown because—well, may I reverse that? I think the Sudan was only grown the first year, and my recollection is that the crop that

(Testimony of Adolph G. Sutro.)

was moved over to the—that my share which was hauled over to the McDaniel ranch consisted of Sudan, so that is what I base it on in saying that it was probably the 1947 crop.

Q. You received that wholly in kind rather than part [1121] in kind and in cash?

A. I have told you what occurred. Whether that should be interpreted as being in kind, or that Mr. McDaniel held it as bailee pending sale, or what the interpretation is, I don't know. The crop was hauled there. When it was sold, I got the money. When I got the money, it was deposited in the bank. That is the sum total of my knowledge.

Q. Perhaps we are using a term you don't understand. What is your definition of the farmer's expression "receipt in kind" of a crop share?

A. Giving you physical possession of so much of the crop.

Q. Calling your attention now once again to the year 1948, you testified to receiving \$176.85 from oats and barley in that year.

A. I was under the impression I testified to it as being in '49. At least, my record here shows it as being received in 1949.

Q. It was with reference to crops grown during the year 1948, was it not? A. Probably.

Q. Now, were any cattle grazed upon the stubble of the oats and barley during the year 1948?

A. I believe that was covered by the check I mentioned that does not appear in the books. [1122]

(Testimony of Adolph G. Sutro.)

Q. In other words, the check from Mr. McDaniel for \$117? A. Yes.

Q. By the way, will you explain to us why it was exorbitantly costly to take water from Pilgrim Creek during the year 1948, thus making necessary dry farming in that time?

A. Well, I will attempt to give you some of the difficulties, to the best of my recollection. The attempt was made to build a dam in Pilgrim Creek and impound a certain amount of water, so that it could be pumped onto the fields. First off, to build a dam on sandy soil is not too satisfactory, because even though an attempt was made to dam it up, why, the water came to the surface just a few hundred feet beyond the dam; in other words, the subsurface flow was so great or subsurface leakage was so great. The pump pumped at a comparatively slow rate, somewhat in line with my testimony in regard to using large heads, and the length of time that the irrigator had to remain on duty to get over the fields with that small amount of water.

Q. Was the volume of water small because the pump capacity was small?

A. Well, that would be one of the reasons, yes.

Q. Was there any other reason?

A. I said that due to the porous character of the [1123] stream bed, it is very difficult to impound water, and, once more, in view of the imminence of the Navy's dredging, there was no reason that other efforts should be made to make the dam more watertight.

(Testimony of Adolph G. Sutro.)

Q. Was there more water in the bed of Pilgrim at that time than there was during the period when Mr. Ikemi was farming the land? A. Yes.

Q. Did you receive——

A. Mr. Ikemi, if I recall, had had a well constructed. Mr. McDaniel attempted to pump from the flow. I had nothing to do with Mr. Ikemi's methods, or with Mr. McDaniel's methods.

Q. Well, it was Mr. McDaniel who farmed the land in 1947, producing a return to you of \$2686, wasn't it? A. Yes.

Q. Did you receive anything else of value for the leasing of the land in 1948?

A. Did I receive anything else in '49, you mean?

Q. No, the question is: Did you receive anything else of value for the leasing of the land in 1948?

A. Not that I know of.

Q. Were any improvements erected on the property by the tenant?

A. Yes. Yes, he put a fence, steel fenceposts and [1124] wire, barbed wire, around the orchard to keep out the cattle when he later on grazed the property.

Q. Is that fence still there? A. Yes.

Q. How many feet of fence?

A. I don't recall. However, Mr. Abbott, in order not to take up the time of the court, I paid Mr. McDaniel for the fence, so it would not appear as a source of income, if that is what you are driving at.

Q. How many head of cattle did he run on the property?

(Testimony of Adolph G. Sutro.)

A. I believe I testified that, to the best of my knowledge, it was somewhere around 200 maximum.

Q. That was your answer as to the year 1947. Was it the same in 1948?

A. I am unable at this late date to remember. After all, I was only down there occasionally, when it looked as if some of this Navy stuff was going to come to a head. Otherwise, I was not around the country or the ranch.

Q. Did he pay on a per head basis?

A. Yes.

Q. How much per head?

A. Well, maybe I can find it in here. I think it was \$3, but I don't know.

(Examining book) It just says, "Rental of pasture, \$366.25." [1125]

Q. You have no independent recollection of the per head basis for the rental?

A. No, the only per head basis of the rental that appears anywhere in the pasture rent is under December, 1952, in which it says, "128 calves pasture for one month at \$2, 25 per cent, \$64." That is the only record in regard to the number of head.

Q. Was the property under lease in the calendar year 1949?

A. Well, I will see what happened here.

Q. Well, don't you have any independent recollection, Mr. Sutro?

A. No, I do not have any independent recollection of each year, as to what went on. It is a long way off, and we have been spending a lot of time trying to get this matter straightened out.

(Testimony of Adolph G. Sutro.)

Q. Very well. What do your records show with respect to that question?

A. It shows miscellaneous income of \$84.

Q. Is that income from the leasing of the ranch?

A. I don't know what it is from. Oh, that was government bounty for complying with the Soil Conservation program.

Q. Well, did you have any rental income for the leasing of that property in 1949?

A. No, none that I see. No, I didn't have [1126] any.

Q. Was the land under cultivation in the year 1949?

A. Judging by the income received, the answer is no.

Q. Have you in any of the years 1947, 1948 or 1949 had crops of any kind planted on the mesa or high land on the ranch?

A. Yes, I have a distinct recollection of paying out money to put a cover crop there to protect the land against erosion.

Q. Was any commercial crop planted there during those years?

A. Are you referring to the time the cover crop was put on the land to protect it?

Q. During the years 1947, 1948 and 1949, was any commercial crop put on the high land?

A. Yes, a hay crop was put on there, and as I was not around there to protect the land, I stopped that practice, because the income from the hay crop, even if good, would not have justified the potential damage to the land.

(Testimony of Adolph G. Sutro.)

Q. Who put the hay crop there?

A. Well, either Rex McDaniel or the Whelan Dairy, I don't know which one.

Q. And in which of the three years did that occur?

A. That I cannot answer, Mr. Abbott.

Q. Did you receive anything of value for the growing of that crop, or did you receive any of the proceeds of the [1127] crop?

A. If there were any proceeds, I received my pro rata. Now, first off, remember the cover crop was not planted with any idea of proceeds. That was a salvage method to attempt to protect the land.

Q. Well, isn't it a fact, Mr. Sutro, during each of those years Mr. McDaniel had dry farming crops on the mesa?

A. It is definitely not a — well, now, wait a minute. Until I know what year I stopped all farming on the mesa, I can't answer that question. I will say this, that I didn't think the income from the mesa warranted the damage to the land, and I stopped farming it.

Q. But there was some income from dry farming crops on the mesa?

A. I don't know. If I did, I wouldn't be hesitant to answer you in a moment. I have nothing to conceal, Mr. Abbott. It is just merely that I do not have an independent recollection of each bale of hay which was produced.

Q. How long did you operate Sutro Baths?

A. Since 1934.

(Testimony of Adolph G. Sutro.)

Q. And in connection with that business, did you keep books and records of all income received?

A. The auditors did. The auditor and the book-keeper did.

Q. At your direction? [1128]

A. At my direction.

Q. But you have no record which will show whether or not you received any income from dry crops on the mesa land during the years 1947, 1948 and 1949?

A. I can show you the records of what I received in those years, but whether it came from dry crops on the mesa land or dry crops from some other field, I am unable to answer.

Q. Well, the Sudan grass was only grown on the bottom land, wasn't it? A. Yes.

Q. And so your figure of gross proceeds from the Sudan grass would not include any income from the mesa, would it?

A. Well, it might. In fact, I think it probably did. It says, "Hay." That is what the entry is.

Q. In the year 1949 was there any alfalfa on the land, Mr. Sutro?

A. Apparently not. At least, I don't see any money from it.

Q. Was there any alfalfa on the land in the year 1950?

A. Apparently yes, because I received \$1039.66.

Q. When was that alfalfa planted?

A. That I can't tell you.

Q. Who planted it?

(Testimony of Adolph G. Sutro.)

A. That was planted by the Whelans, the Whelan Dairy. [1129]

Q. When did your leasing to the Whelan Dairy commence?

A. That was after Mr. McDaniel. We talked it over, and he said it was so terrifically expensive to farm the ranch, due to the fact that he had to haul his equipment back and forth, and as far as he was concerned, if Miss Whelan wanted it, she being the—having the adjacent ranch with just a gate between, it would be all right with him. In other words, if it wasn't for the fence, the Whelan ranch and ours would be the same thing.

Mr. Abbott: Will you read the pending question, Madam Reporter?

(Question read.)

The Witness: At the end of my leasing period to Mr. McDaniel.

Q. (By Mr. Abbott): Well, you have told us about two leases to Mr. McDaniel, one for the year 1947, and one for the year 1948. A. Yes.

Q. Is it then your testimony that you began leasing the property to the Whelans in the year 1949?

A. Provided I had not leased it to Mr. McDaniel in that year, yes.

Q. Was the property under lease to anyone in the year 1949?

A. I do not have any independent recollection of that. [1130] Mr. Abbott, I assure you that I

(Testimony of Adolph G. Sutro.)

am attempting to answer these questions in good faith. If you will only realize the conditions which existed, it was daily expected that the Navy would act on one of these plans. Nothing was permanent. No proper way of farming was possible, and, frankly, no detailed records such as I would normally keep in operating a business were kept on the various sources of the income.

Q. We have all been impressed with your detailed recollection of certain other transactions relative to this matter. Don't you have an equally good recollection of your leasing transactions, your conversations with the lessors, and the crops you grew?

A. Mr. Abbott, I can assure you that there is no subject in the wide world about which I am less familiar than the subject of accounting.

Q. How about the subject of crops and acreage?

A. I am not able, as I mentioned before, to estimate acreage on a field irregular in shape, partially covered with alkali and partially covered with trees and undergrowth.

Q. Very well. Sometime, and as yet unidentified, you leased the property to Miss Whelan for the growing of alfalfa. How long was the alfalfa on the land?

A. Until we had to let the crop die because our letter of March 31st was not replied to—March 31, '50.

Q. How long—how many years and how many months was [1131] the crop of alfalfa on the ground?

(Testimony of Adolph G. Sutro.)

A. It was on the ground from the time it was planted until sometime after—I believe the date of my letter was March 31, 1951, but I am not sure.

Q. Was that three years?

A. I don't remember.

Q. Well, was it more or less than three years?

A. I am still unable to give you an intelligent answer to that question.

Q. Was it more or less than five years?

A. It was less than five years, yes.

Q. Was it less than three years?

A. I said I was unable to answer that question intelligently.

Q. Was this land leased for alfalfa purposes on a share basis?

A. It was leased on a share basis.

Q. How many cuttings were made?

A. Oh. Well, I got \$1039.66 on November 15, 1951, and I got \$252.25 in December, 1930.

Mr. Cranston: December, 1930?

The Witness: December 30, 1952. Please excuse me.

Q. (By Mr. Abbott): What was the latter figure in dollars? A. \$252.25. [1132]

Q. All right. Now, how many cuttings of alfalfa resulted in that income?

A. I know that the crop was an excellent crop. I remember that Mr. Vail and Mr. Rorapora of the Vail Company came over and commented on it. Great expectations were had for the field, but I cannot tell you how often it was cut.

(Testimony of Adolph G. Sutro.)

Q. How many acres were planted to alfalfa?

A. I will have to give you the same answer as before, that part of the bottom land that was not covered by alkali, trees or undergrowth.

Q. Was it more than 10 acres? A. Yes.

Q. And was it less than 90? A. Yes.

Q. Was it more than 50?

A. I am unable to state.

Q. Was it more than 30?

A. I would think so.

Q. Was it more than 40?

A. You are cutting it much too fine for my ability to estimate the area of the field.

Q. Now, this crop was on a share basis, and you were interested in it as a proprietor. Did you discuss the acreage to be planted with Miss Whelan?

A. The acreage to be planted was the available acreage. [1133]

Q. Did she make any representations to you as to how much she would plant? A. No.

Q. Did she in reporting—

A. Now, wait a minute. Let me clarify that. I said, I believe, that the acreage to be planted was the available acreage.

Q. Did she make any representation as to the number of acres which would be planted?

A. No, not that I recall.

Q. Did she in reporting on the yield of the crop tell you how many acres had been planted?

A. No, she gave me the baler's weight tags.

Q. Did she tell you how many bales or pounds had been produced per acre?

(Testimony of Adolph G. Sutro.)

A. Except that the crop was phenomenal in its weight, I do not know.

Q. Well, did she give you any report on the yield per acre?

A. How many tons per acre?

Q. Or any other measure?

A. It was considerably above the average, but what it [1134] was, I do not recall.

Q. Did she give you a report, Mr. Sutro?

A. To the best of my knowledge, she mentioned her estimate of the tonnage per acre.

Q. And what was that estimate?

A. I do not remember.

Q. Was she irrigating the alfalfa?

A. Yes.

Q. During the entire period?

A. Until such time as the Navy shut off the sewage, and then the crop was allowed to die, and pastured off by cattle. We wanted to put in a pump and save the crop, but were unable to get a reply to our letter, which would warrant me in spending that money.

Q. Well, you had a well on the property at the time that the effluent ceased, did you not, in the bottom land?

A. Yes.

Q. Was there anything to stop you from harnessing the well, and putting a pump there, and using that water?

A. I believe the matter was gone into in detail in the letter which is in evidence in this case.

Q. Do you have any answer to that question

(Testimony of Adolph G. Sutro.)

other than the letter to which you have previously alluded?

A. Well, I would only be repeating the statements which are contained in the letter. [1135]

Q. Very briefly, there really was no reason why the well could not be pumped at that time, was there, Mr. Sutro?

A. Very briefly, Mr. Abbott, if there were no reasons, we would have pumped it.

Q. Then why didn't you pump it?

A. You want me to repeat the reasons given in the letter?

Q. If those are the answers to the question, yes.

A. We did not know what the Navy plans were. We did not know where the creek was going to run under any future changes that they might have. After all, the channel of Pilgrim Creek was not at one time the accepted discharge for the effluent plants, the sewage plants.

The value of the alfalfa crop was such—my share was such that I did not think I would be warranted in putting in a temporary pump, or a pump which I was not sure could be permanent; that I would have to obligate myself either to an electric power contract for three years to get the extensions, or I would have to rent a gasoline pump for which I would have no further use. In other words, there were so many intangibles that I could not see as a prudent man where I was warranted in making an investment from which I might not be allowed to receive a satisfactory income.

(Testimony of Adolph G. Sutro.)

Q. And those were the reasons why you did not pump water from the well to save the alfalfa crop; is that correct? [1136]

A. In addition, Mr. Abbott, we requested a reply—Mr. Cranston, I believe, sent the letter to your office—in more or less time in which, by bending every effort, we might be able to save the crop. The time went along, went by, waiting for an answer to that letter.

Q. You mean the letter in which you asked Mr. Deutz if the pollution would continue; is that correct? A. That is the letter.

Q. And that is the letter, an answer to which was required before you could put a pump in the well to irrigate the alfalfa?

A. That is the letter to which an answer would have aided in determining whether it was economically desirable to put the pump in. There was no mechanical reason, if the pump was readily available, that it could not have been put in the well. The question was, would it pay?

Q. Didn't you contemplate putting a pump in that well, regardless of the use of the property?

A. Certainly. We eventually figured on putting in a pump, after we knew the final decision of the Navy.

Q. Did you have cattle grazing on the land subsequent to 1949? A. Yes; yes, definitely.

Q. Whose cattle were they?

A. They were either Whelan Dairy cattle, or the cattle [1137] of Rex McDaniel.

(Testimony of Adolph G. Sutro.)

Q. How many in the year 1950?

A. I have no recollection.

Q. Do your records show?

A. Pasture? What year, Mr. Abbott?

Q. 1950.

A. It doesn't show any rental of pasture in 1950. Wait a minute.

Q. Were there cattle, in fact, on the land in the year 1950?

A. Well, if there were cattle in the year 1950, I would have received a check for it.

Q. How many cattle?

A. I said I had no recollection of the number of cattle.

Q. Have you made demand for the rental for pasture used in that year?

A. I don't know if there were any cattle that year. I said, if there had been cattle, I would have been paid for it.

Q. Were there cattle on the land in the year 1951?

A. Well, I show pasture rent in the year 1952, so judging by the speed with which bills are paid there, I presume it covers the 1951 bill, Mr. Abbott.

Q. How much was that? [1138]

A. \$52. Wait a minute. Excuse me, please, \$64.

Q. When was it that the alfalfa crop died for lack of water, Mr. Sutro?

A. Shortly after the pumping over ceased.

Q. Which was in July, of 1952? A. Yes.

Q. Did you receive anything else of value for

(Testimony of Adolph G. Sutro.)

the leasing of the land during the years 1950, 1951 and 1952?

A. Well, in case you don't have the figures—you are saying '50, '51 and '52?

Q. That is correct.

A. My records show miscellaneous in 1950 of \$84; rental of pasture, \$1039.66 in 1951; and rental of pasture, \$252.25—excuse me—no, that is hay \$252.25, and rental of pasture \$64.

Q. The question is not what your records show. The question is, did you receive anything else of value for the rental of the land during those three years?

A. No, the only thing I ever received of any value was that \$117 check, and I have not been able to place the exact year that that came in.

Q. Did it appear to be a good stand of alfalfa that Miss Whelan had on the property?

A. Yes. I believe a few moments ago I testified that experts had said it was an outstandingly good stand. [1139]

Q. Was there anything grown on the mesa land during the years '50, '51 and '52?

A. Maybe I can work that back. Will you excuse me just a moment? I might be able to give you an estimate there.

No, I can't tell you. Somewhere along in there this cover crop was put on, and I refused to allow the mesa to be farmed any more. My damage, as I said, was far more than the value of any crop.

(Testimony of Adolph G. Sutro.)

Q. How many years was there any crop on the mesa?

A. That crop was on the mesa until this year.

Q. Then when was it first put on the mesa?

A. That is what I am trying to find out, and I can't tell you, but the crop was on the mesa until just a few weeks ago.

Q. Can you state whether or not the proceeds of that crop appear in the figures you have previously testified to?

A. Mr. Abbott, I told you this was a cover crop, and I insisted that it stay there in order to protect the mesa. The land, that type of land, is very subject to erosion, unless properly protected, and I have had very severe losses for which we are making no claim.

Q. Confining the question to commercial crops grown on the mesa——

A. Yes. [1140]

Q. ——are you able to say whether or not the proceeds of any commercial crop grown on the mesa appear in the figures you have previously testified to?

A. Yes.

Q. Mr. Sutro, are you generally familiar with the structures and installations on ranches in the area in which yours is located?

A. Only casually, Mr. Abbott.

Q. But you have been on a number of those ranches in connection with your investigation of market values and rental values, have you not?

A. Mainly at night. If I recall the times on my report, after or around dusk.

(Testimony of Adolph G. Sutro.)

Q. What is the total square footage in the equipment shop which you planned?

Mr. Cranston: If the court please, I have no objection to cross-examination, but the record speaks for the total square feet.

The Court: That is true. Of course, it can be figured, but it is cross-examination. But I hope we don't take up too much time on matters that are arithmetical, at least.

Mr. Abbott: No, that wasn't my intention at all, your Honor, and I am not testing the witness' knowledge of the square footage, or anything of that type. If counsel has the figure, I will accept it from him. [1141]

The Witness: My recollection is 2600 on the ground floor, and 1600 on the mezzanine.

Q. (By Mr. Abbott): And in the implement shop?

A. I think that was 21 by 46. Not too far from 1000 feet.

Q. And in the storage shop, or the storage shed, I believe it is called?

A. I believe that was 40 by 60, if I am correct.

Q. 2400 square feet?

A. Well, I am not sure of that floor space there, but it is not too far off.

Q. Quick arithmetic indicates a total of 7100 square feet devoted to those three structures. Can you name another ranch in the San Luis Rey Valley which has that square footage in structures devoted to the purposes indicated?

(Testimony of Adolph G. Sutro.)

A. I believe I mentioned, when you first asked me that question, Mr. Abbott, that I only had a slight familiarity with the structures on other ranches in the valley.

Q. How many other ranches have you been on?

A. I have been on a great many of them.

Q. Never in the daytime?

A. Yes, frequently in the daytime.

Q. Well, can you name a single one of those ranches you visited which has 7100 square feet of area devoted to the three purposes [1142] indicated?

A. Mr. Abbott, I can not either say that is the case, or say that is not the case. After all, you know ranches don't have to have all their buildings sandwiched up one after the other like a file of soldiers.

Q. In other words, your answer is, you don't know?

A. My answer is, I don't know.

Q. Can you name any other ranch in San Diego County which has a crane, Mr. Sutro?

A. There are several over at Camp Pendleton, and they do some very large farming operations, Mr. Abbott.

Q. Owned by the United States, you mean?

A. Cranes, yes.

Q. Are they used in the agricultural pursuits on Camp Pendleton?

A. I have seen them used for clearing channels on Camp Pendleton and adjacent property.

(Testimony of Adolph G. Sutro.)

Mr. Abbott: May I have that exhibit with the list of shop tools, please?

(The document was handed to counsel.)

Q. (By Mr. Abbott): Now, to save time, Mr. Sutro, I am going to read a list of tools, and I will read it slowly, and ask you to interrupt me when I come to a tool which you know is owned by one of the other ranchers in the San Luis Rey Valley or the Pilgrim Creek area.

A. Just a moment, until I orient myself with some of [1143] the shops with which I am acquainted. Do you mean in the general vicinity, or are you limiting yourself to the San Luis Rey Valley?

Q. The San Luis Rey Valley and the Pilgrim Creek area, Mr. Sutro. As a matter of fact, I will simplify this, and present you the shop plan, which is Plaintiff's Exhibit 44-D, which has marked on it a number of pieces of equipment, oh, roughly 20, and ask you if you will tell me which pieces of equipment you see there that can be found on other ranches in the San Luis Rey Valley or the Pilgrim Creek area.

Mr. Cranston: If the court please, I will object to this line of cross-examination as immaterial. Mr. Sutro intended to have this equipment in 1946, and whether anybody else has it or not is immaterial. He intended to use it for his own purposes, and I don't think that the United States, as a tortfeasor, can say because everybody else does not

(Testimony of Adolph G. Sutro.)

use that same equipment that he is not damaged when he is prevented from using it.

It seems to me that if the building was to be erected and that equipment placed in it, and he is prevented from buying it or using it, he is damaged, even if he is the only person in the world who wants to use that particular equipment; that it does not depend upon how many other people in that vicinity use the same equipment.

The Court: That may be true, but still this is proper [1144] cross-examination, giving to the court at least a suppositious measure to evaluate evidence that consists to a great extent in a conception, a mental conception. That is what I was trying to illustrate earlier: the difficulty of evaluating legal evidence when the greatest factor in the production of it is a mental concept that hasn't developed or reached the point of an embryonic representation on paper, or something of that kind. I don't know if that is the purpose of the interrogation or not——

Mr. Abbott: It is one of the purposes, your Honor.

The Court: ——but I think it is proper cross-examination.

The Witness: Would you repeat the question?
(Question read.)

The Witness: Well, starting in the upper left-hand corner, I see a compressor. I have seen compressors on other ranches. I cannot tell you which one, but a compressor is not a particularly rare piece of farm machinery.

(Testimony of Adolph G. Sutro.)

I also see a sink. I believe most homes have sinks in the San Luis Rey Valley.

I see a bench for plumbing and painting. I have seen pipe vices and paint brushes on other ranches. I see a hacksaw. I have seen a power hacksaw on other ranches. I have seen a drill press.

Q. (By Mr. Abbott): Would you mind identifying the [1145] ranches on which you have seen them?

A. I have seen a drill press on the McDaniel ranch. I even believe I have seen a drop hammer on the McDaniel ranch. I have certainly seen grinders on almost every ranch.

Q. How about arc welding equipment, Mr. Sutro? Have you seen any of that?

A. Yes, that is very prevalent.

Q. Where have you seen it?

A. Oh, just offhand, McDaniel has one.

Q. How many acres does McDaniel farm?

A. He has about 600, I believe. Most of the ranches—now, are you asking me what I know exists, or what I am reliably informed?

For instance, I know a ranch that employs a full-time welder, but I haven't seen their equipment. But I know he does not have a full-time welder unless he has arc welding equipment. I do know that on the Asasuchi ranch they have a full-time welder, and he has arc welding equipment. In fact, they have an arc welding truck.

Q. Do you know another ranch in the San Luis Rey Valley or in the Pilgrim Creek area which

(Testimony of Adolph G. Sutro.)

has 10 or more pieces of power shop equipment?

A. Not offhand, no.

Q. How many pieces does your plan call for, Mr. Sutro? A. I never counted them. [1146]

Q. It is in excess of 10, is it not?

A. Are you referring to the pieces that I now have on hand, or the pieces on which we are claiming a loss, Mr. Abbott?

Q. Well, have you purchased all of these pieces of equipment that are described in the chart you are now viewing, and in Plaintiff's Exhibit 44-G?

A. No, that wasn't what I was trying to find out. I own certain pieces of equipment, such as a traveling crane, for which there has been no claim made on the Government.

Q. You are claiming the cost of the installation of the crane, are you not?

A. I am claiming the damages in the cost of the installation.

Q. Precisely.

A. I know of no more useful tool around a ranch than a crane, but whether that—excuse me.

Q. Now, Mr. Sutro, will you explain to the court what circumstance attributable to the conduct of the Government, which is the subject of this action, prevented you from erecting this shop and installing this equipment in 1946?

A. Why, certainly. This is rather valuable equipment. There should be someone living on the ranch. No one was able to live on the ranch to protect the equipment.

(Testimony of Adolph G. Sutro.)

Q. Did you secure the price of insurance on the equipment, [1147] to protect against loss of that type?

A. No, Mr. Abbott. I am not looking to have losses that I have to collect on from insurance. I did not see any reason to put up an unattended shop, with this valuable equipment in it and the supplies, none of which the Government is being asked to do anything about, and leave it unattended, an invitation, as it were, to a breaking and entering, just in the hope that I would be able to collect on an insurance policy.

Q. Would the cost of the insurance to protect the entire shop and all the equipment in it be more or less than the item of damage you are claiming with respect to the shop and its equipment?

A. The cost of insurance would be less. However, if the shop could not be used, there was no reason for building it.

Q. Is there any reason why the shop could not be used, Mr. Sutro?

A. Yes. Nobody could live on the ranch.

Q. You weren't drinking bottled water in 1946, as you are now, I take it?

A. I don't understand your question.

Q. Was bottled water available, Mr. Sutro, in 1946?

A. Well, I never heard of having to do my bathing with bottled water, or cooking with bottled water, or having to [1148] watch my step every moment so that I would not come near tap water.

(Testimony of Adolph G. Sutro.)

So while bottled water was available, I did not care to live where only bottled water was available.

Q. In connection with your operation of Sutro Baths, did you acquire a knowledge with respect to filtration and water treatment plants?

A. Oh, yes. In fact we offered, at our own expense, to put in a purification plant for the Navy sewage, in order to protect the matter, but we were unable to get an answer.

Q. Did you intend to put in a plant for your own domestic source of water?

A. No. As a matter of fact, I am allergic to drinking sewage, whether it has been purified or not.

Q. Do you ever drink the water that flows through the Los Angeles city water system, Mr. Sutro?

A. Not if I can help it.

Q. Well, would you have considered the water suitable for domestic purposes if purification had occurred up at the plants, as you offered to effect on behalf of the Navy?

A. If purification had occurred up at the plants, it might have been possible that by pumping the well slowly enough to allow for natural flow from the surrounding area, to infiltrate in the well, to have used the water for domestic purposes.

Q. Would that have been sewage water, when so used? [1149]

A. No, not by barely drawing the well down. I do not think the hydraulic gradient would have been sufficient to bring sewage into the well.

(Testimony of Adolph G. Sutro.)

Q. Mr. Sutro, do you still plan to build the home that you have described in your testimony?

A. Yes, Mr. Abbott.

Q. Well, have you ever varied from that intention during the period from 1946 to the present time?

A. Yes, Mr. Abbott.

Q. And when was that?

A. That was when I was so hard up, from having spent so much money in an effort to mitigate damages, that I thought I would have to cut down on my building plans. As you know, I have spent tens of thousands of dollars attempting to get this matter settled, and it seemed to me like I would have to cut down the size of the home.

Q. At what point of time was it that you temporarily abandoned your plans with respect to the home?

A. I believe it was mentioned in that letter that Mr. Deutz received, that I had been bled white, I had had to neglect my business for years on a matter which two business men could have settled in three minutes, that I did not have time to devote myself to keeping up my income, and I wrote and said it was doubtful if I could afford to build that home. [1150]

Q. Is that a letter which was written on April 2, 1951?

A. I think it was written in March.

The Court: In March?

Mr. Cranston: I believe you are referring to my letter, transmitting Mr. Sutro's letter.

Mr. Abbott: Yes, I am.

(Testimony of Adolph G. Sutro.)

Q. (By Mr. Abbott): Anyway, that was in March, 1951, Mr. Sutro?

A. I believe that was the date.

Q. What was your net worth at that time?

A. Insufficient, in my opinion, to afford that house.

Q. What was it in dollars?

Mr. Cranston: If the court please, I object to that as immaterial.

Mr. Abbott: I would like to show the materiality, your Honor. We would like to show that the witness made a written admission of abandonment of intention, and he is anticipating the question and is explaining his motives as being financial. I think under those circumstances the question is material.

The Court: Overruled.

The Witness: I would be unable to state my exact worth, Mr. Abbott, but I know I did not have the spare cash to build that home.

Q. (By Mr. Abbott): Did you have a net worth in excess [1151] of \$100,000 at that time?

A. Yes.

Q. Well, was it in excess of \$500,000?

A. No.

Q. Was it in excess of \$200,000?

A. It might have been. There is a distinction, Mr. Abbott, between net worth and cash income.

Q. I have become acutely aware of that at times.

A. I have for years.

Q. What was the area of this home, roughly? It was about 3750 square feet, was it not?

(Testimony of Adolph G. Sutro.)

A. I think you are a trifle high, but not much.

Q. About 3700, roughly?

A. Well, all right. I thought it was 3600, but that is close enough.

Q. And it was planned to that size to accommodate both yourself and your mother; is that correct?

A. Yes.

Q. Do you have any family at the present time, Mr. Sutro?

A. No.

The Court: Mr. Abbott, let me inquire, without indicating that I am trying to rush you, do you think you can finish the cross-examination in a few minutes?

Mr. Abbott: I think it will take a little longer than [1152] that, your Honor. The direct was rather long, and I have a number of notes to cover.

The Court: If we cannot finish tonight, there is no use keeping everyone here much longer, on account of these traffic conditions. I think we will recess now until 10:00 o'clock, but I think you had better have your witness here in the morning, Mr. Cranston.

Mr. Cranston: Yes.

The Court: So that we can proceed with the case a little more speedily tomorrow. Probably overnight you can get your questions in mind so as to try to elicit the answers a little more expeditiously than we have today.

Mr. Abbott: Yes, sir.

The Court: You have covered pretty nearly all

(Testimony of Adolph G. Sutro.)

of the phases, I should think, that should be explored on cross-examination.

Mr. Abbott: I will review my notes, your Honor, and attempt to be as concise as possible.

The Court: Very well. 10:00 o'clock tomorrow morning.

(Whereupon, at 4:35 o'clock p.m., an adjournment was taken until 10:00 o'clock a.m., Thursday, March 4, 1954.) [1153]

March 4, 1954, 10:00 A.M.

The Court: Proceed, gentlemen.

ADOLPH G. SUTRO

the plaintiff herein, having been heretofore duly sworn, resumed the stand and testified further as follows:

Cross-Examination (Continued)

By Mr. Abbott:

Q. Mr. Sutro, returning to the crops grown by Miss Whelan on your property, did you receive any of the proceeds of those crops in kind?

A. No, Mr. Abbott, I did not.

Q. All of the rent and all of the consideration you received from Miss Whelan was in cash?

A. Well, I think she did some work, which was taken into consideration in the settlement.

Q. And your share was reduced by the value of that work?

A. Yes, that would be the case.

(Testimony of Adolph G. Sutro.)

Q. What was that work?

A. It was that leveling, which was discussed; that floating of the land.

Q. Yes. Now, you testified, Mr. Sutro, that the construction of the residence building was commenced in 1936. Who was the general contractor on that job? [1155]

A. There was no general contractor on the job, Mr. Abbott.

Q. Were you acting as an owner-contractor?

A. That was my intention at that time.

Q. Did you have a foundation subcontractor?

A. No, we would put in our own foundations.

Q. Did you employ labor for that purpose?

A. We had graded out and excavated for the foundations. We had not started to pour them.

Q. Did you have an excavation subcontractor?

A. Yes.

Q. Who was he? A. M. A. Willard.

Q. Are those excavations still on the property, Mr. Sutro?

A. Yes, Mr. Abbott, they are still there.

Q. Have you, since 1946 up to the present time, resumed work on the residence?

A. No, Mr. Abbott.

Q. Have you commenced work on any of the other structures, with the exception of the shop building? A. Yes.

Q. What structures?

A. I commenced work on the residence and the implement shed. [1156]

(Testimony of Adolph G. Sutro.)

Q. By commencing work on the residence, you mean the work——

A. I meant the help house. Excuse me.

Q. Do you mean by work on the help house, an extension on the existing caretaker's house?

A. No. The help—the location delineated on the plot plan.

Q. Is the implement shed a building different from the shop building? A. Yes.

Q. What is the approximate state of construction at the present time of the implement shed?

A. We started to work on it, and right after the hearing of September 20th Mr. Cranston wanted me to close down everything in order to have sufficient time to prepare for the case. We thought it was going to be held—I believe the hearing was to be held December 7th, and I thought as long as the shop was fairly well along, that we would stop construction on the help house and the implement shed.

Q. Well, how far had construction proceeded as of September 29? A. On what?

Q. On the help house.

A. On the help house. We had about half completed the excavations on the site for the foundations. [1157]

Q. What type of foundations were those?

A. Those were pier foundations. I believe the drawing shows it, but my—the drawing would be the answer. I forget whether they were continuous, or pier. My recollection is a little hazy on that point.

(Testimony of Adolph G. Sutro.)

Q. That is an excavation of what—about 18 inches, Mr. Sutro?

A. No, this was a side hill. I had to cut a bench on it.

Q. How far had you progressed in the construction of the implement shed on September 29, 1953?

A. We had laid it out. We had stretched the lines for the setting of the screeds. In fact, I think the screeds—some screeds may have been set for the pouring of the floor.

Q. Are those still in place?

A. The only thing in place are the ditches for the underground piping, which was to, or is to connect the two buildings, and that is still there, where the excavation or trenches were cut, except that we got caught in one of our intermittent rains, and they are not as neat as they were when they were first put in in September.

Q. So with respect to the help house and the implement shed, the only work done has been moving of earth as of September 29th, and as of the present time; is that right?

A. No, I think we started to set screeds on the implement [1158] shed.

Q. Yes, you did so testify. Do you have a general contractor employed to do that work, Mr. Sutro?

A. No.

Q. Do you have any subcontractors employed to do that work?

A. No.

Q. Have you requested bids from general or

(Testimony of Adolph G. Sutro.)

subcontractors with respect to that work?

A. No.

Q. Have you done any work with respect to the guest house? A. No.

Q. Have you done any work with respect to the storage shed?

A. No. After all, putting up the three buildings at one time was about all I wanted to tackle.

Q. Now, was the tool shed which is presently in process of construction as useable for the growing of alfalfa, and black-eyed beans, and flowers, and vegetable seed as it was for the growing of truck vegetables, Mr. Sutro? A. No.

Q. What would be the difference between its uses with respect to those two classes of crops?

A. Because truck farming is probably the most highly [1159] mechanized of any type of farming that I know of, and the growing of alfalfa usually does not require the investment in equipment, nor the maintenance of equipment.

Q. Well, then, I will ask the same question with respect to the storage shed. Is that as important to the growing of alfalfa, black-eyed beans, vegetables for seed, and flowers grown commercially as it is to the growing of truck vegetables?

A. I am not qualified to answer that question. That is getting a little bit too technical for me to hazard a reply, Mr. Abbott, even though I assure you I would be happy to do so if I were able.

Q. At any rate, you know of no reason why

(Testimony of Adolph G. Sutro.)

it isn't as suitable for one purpose as it is for the other?

A. I said I was unable to answer that question.

Q. Directing your attention to the help house.

A. Yes.

Q. Do you know of any reason why that isn't as suitable for the growing of one class of crops as it is for the growing of the other class of crops?

A. In my opinion, it would be equally suitable.

Q. Finally, calling your attention to the implement shed, is there any reason why that is not as suitable to the growing of the one class of crops as it is to the growing of the other class of [1160] crops?

A. It would be my impression that it was equally suitable.

Q. Did you maintain a residence in the city of San Francisco up until the time that you sold Sutro Baths?

A. Could you explain to me what you mean by maintaining a residence, Mr. Abbott?

Q. I don't know how to further clarify the question, Mr. Sutro. Did you have a place where you lived?

A. Then may I tell you what we did?

Q. I don't think a lengthy explanation is necessary.

A. I assure you the explanation will not be lengthy.

Q. Very well, sir.

A. We sold our home in 1948. Thereafter we

(Testimony of Adolph G. Sutro.)

moved from place to place, hoping that this matter would be settled. The original intention was to build the home here and make one move. In 41 years, Mr. Abbott, I moved once. Since this has happened, I think I have moved four or five times. I would not call the place where we lived, any of them, a home.

Q. From the time when you purchased the ranch up until the time that you sold Sutro Baths, did you continuously have some premises in the city of San Francisco where you could sleep and eat?

A. Mr. Abbott, the expression is perfect. They were premises where you could sleep and eat.

Q. Was that an apartment, Mr. Sutro? [1161]

A. No, it was an alleged bungalow.

Q. Now, during that period I have last defined, you were exercising supervision over Sutro Baths, were you not? A. I was, among other things.

Q. And that took a great deal of your time, did it not?

A. On the contrary, Mr. Abbott, I can assure you that I have spent the major part of eight years attempting to get this matter straightened out.

Q. And staying in touch with the commercial activities being conducted on your ranch, I assume, also?

A. My activity was mainly an attempt to arrive at an understanding which would enable me to proceed with my investment.

Q. Now, Mr. Sutro, have you in building the shop building, which is partially completed at the

(Testimony of Adolph G. Sutro.)

present time, put in any special foundations for the shop equipment?

A. The floors are heavier than is customary in order to permit the installation of equipment.

Q. What is the material with which those floors are constructed? A. Wood.

Q. How thick?

A. It would be a double floor, approximately—what is known as 2-inch. After they finish planing lumber these days, it is not the full size. [1162]

Q. By a double floor, you mean a subfloor, with flooring material added on top?

A. That is correct.

Q. But you have no concrete foundations or bases for any of this power equipment or heavy equipment of any type?

A. No; and, frankly, I don't know of any of it offhand that would require it, except the wood-working machinery in the, shall we say, alcove, for which a concrete floor was intended.

Q. Have you built all of the items of equipment which appear on the plan of the shop building?

A. No, I have not.

Q. Have you bought any of those items which you did not have in 1946?

A. Have I bought any tools since 1946, or tools which appear on that——

Q. Tools which appear on the shop plan.

A. May I see the plan? I could probably answer your question more intelligently.

(Testimony of Adolph G. Sutro.)

Q. The plan referred to, of course, is Plaintiff's Exhibit 44-G.

A. This is since 1946 to date that you are asking me, Mr. Abbott?

Q. Yes.

A. Yes, I have obtained a compressor and the laps. [1163]

Q. In naming these things, will you state the approximate date that you purchased them, please? Well, the year, if you will.

A. I can't even do that, Mr. Abbott. I can tell you what I had, and what I don't have, but I can't tell you when I got them. However, there are not very many, I assure you.

Q. All right. Well, give us the list then.

A. Yes.

Mr. Cranston: What was the second item you mentioned, Mr. Sutro? You named the compressor.

The Witness: And laps, l-a-p-s. The gas welding equipment—and, by the way, I can give you the date on that—that was purchased in 1953. The sander was purchased. That's all I notice.

Q. (By Mr. Abbott): Have you placed the orders for any of the other items of equipment shown on that plan? A. No, Mr. Abbott.

Q. Now, Mr. Sutro, you testified to an investigation of the leases of what you considered to be comparable property. A. Yes.

Q. In the areas surrounding your ranch, and as far away as Vista. By the way, how far away is Vista, Mr. Sutro?

(Testimony of Adolph G. Sutro.)

A. Vista proper, or the Vista district?

Q. Well, that area in Vista which you visited in connection with your inquiry. [1164]

A. I would say—I would guess between five and six miles. I would guess around six miles.

Q. Now, in connection with that inquiry, did you ascertain the types of crops being grown by the tenants whose leases you investigated?

A. May I have the notes?

Q. Certainly. This question does not call for a review of each interview; merely a general statement as to the scope of your inquiry.

A. Well, then the answer is on some occasions I did.

Q. And did you on some occasions inquire as to the acreage being planted? A. Yes.

Q. Did you ascertain the particular years with respect to which the data secured related?

A. The data secured being what, Mr. Abbott?

Q. Well, the data that you were seeking in your investigation, Mr. Sutro.

A. Why, I believe my investigation shows a tabulation by years of the rentals received.

Q. Exactly. You worked it out year by year with the people you interviewed?

A. Naturally.

Q. And in each case did you endeavor to ascertain whether the land in question was comparable to your land? [1165]

A. To what extent do you mean I should have gone? I think I see what you are asking, Mr.

(Testimony of Adolph G. Sutro.)

Abbott, but I would like to be sure that both——

Q. Were you seeking to find conditions comparable to those which existed on your ranch, Mr. Sutro?

A. Yes. I can assure you that this list was not a hand-picked list, that it consists of everyone I talked to, not the ones that were most favorable.

Q. And you made a diligent effort to find everyone who could give you information with respect to rental value of property comparable to your own, then?

A. No, I did not make a diligent effort to find everyone.

Q. To find many people who could give you information?

A. I thought I had a reasonable cross section from one of the largest renters in the vicinity to people who rented smaller amounts.

Q. Did you go to your own tenants to get that information, Mr. Sutro?

A. The Whelans mentioned about the Nichizu rent to which I testified in court.

Q. Did you ask the Whelans about the years, the crops, the acreage, the rent on your own property?

A. Your question is not clear to me. Did I ask them about rent which they had paid me? [1166]

Q. Yes.

A. I didn't think what was received for the rents on my property, in view of the conditions under which people were forced to operate was in any way comparable.

(Testimony of Adolph G. Sutro.)

Q. Well, did you ask them what crops they grew in what years on your property?

A. Why, no. You mean in the course of this investigation?

Q. Yes, sir.

A. Why, certainly not. It would never——

Q. Did you ask them what acreages were planted on your own property?

A. It would not occur to me to do it. Besides, I do not know how they could estimate it. After all, Mr. Ikemi, who was a very practical farmer, estimated, I believe, 70 some odd acres, when a survey showed it to be 97, and when he was farming the land, it was open and clear.

Q. Did anyone, to your knowledge, survey the land being farmed by Mr. Ikemi?

A. Not to my knowledge, except that Mr. Ikemi stated he farmed all the bottom land and the mesa, and the neighborhood told me that that was correct. Various people said that was the land which had been farmed, and, of course, it was self-evident from inspection.

Q. Your counsel has made an offer of proof with reference [1167] to certain items of damages excluded by the court. Did you keep a detailed record of all of the items of damages referred to in the offer of proof?

A. Yes, Mr. Abbott.

Q. And that record goes back to 1946, Mr. Sutro?

A. Yes, Mr. Abbott.

Q. And it consists of many hundreds of items, does it not?

A. Yes, Mr. Abbott.

Mr. Abbott: No further questions, your Honor.

(Testimony of Adolph G. Sutro.)

Redirect Examination

By Mr. Cranston:

Q. Mr. Sutro, you were asked certain questions yesterday concerning your receipts from crops and the tonnages received on them. At that time you stated you were unable to give any information as to the tonnages. What documents were you examining at that time?

A. I was examining a report which covered the operation of the ranch.

Q. Had you examined your ledger at that time?

A. No, I believe the government had the ledger at that time.

Q. And have you examined it since that time?

A. Yes.

Q. I will show you an account page, account No. 15, and [1168] ask if, basing your answer upon that account, you can give certain of the information that was requested yesterday. A. Certainly.

Q. Will you state what this ledger sheet shows with reference to income from hay?

A. It shows that on February 27, 1948, 30¼ tons of hay at \$35 a ton, a total of \$1,058.75, was received.

Q. And on October 1st?

A. 70,163 pounds of hay, at \$1.75 a hundred, in other words, about 35 tons at \$35, \$1,227.85.

Q. And another entry on the same day in 1948.

A. 20 tons of Sudan at \$20, \$400.

(Testimony of Adolph G. Sutro.)

Q. And are the total receipts for hay for that year shown in this account?

A. Yes, \$2,686.60.

Q. And is there an entry for 1951 on this page?

A. It says, "From Whelan Ranch, \$1,039.66."

Q. There is a notation under the column headed "Folio" of "392." Does that refer to any particular entry?

A. That refers to the entry, the original entry in the checkbook, from which this entry was made.

Q. I show you——

A. That is the check record.

Q. Can you find in here the entry to which this refers?

A. 392? Yes, November 15th is the entry. [1169]

Q. Yes. What is set forth under the entry November 15, 1951, in this check register?

A. It says, "Received from Whelan Ranch, \$1,039.66."

Q. And what is contained underneath that, in reference to the manner in which that figure is arrived at?

A. It says, "First cutting of alfalfa, 27 tons, 240 pounds, at \$20 per ton, \$542.40."

Shall I read all of this?

Q. Yes.

A. "Second cutting of alfalfa, 45 tons, 1200 pounds, at \$34.00 per ton, \$1,550. Third cutting of alfalfa, 55 tons, 1240 pounds, at \$37.50, \$2,085. Fourth cutting of alfalfa, 55 tons, 1240 pounds, at

(Testimony of Adolph G. Sutro.)

\$20, \$1,112.40." It says, "Above alfalfa damaged by rain."

The next item says, "Pasturage 161 head for 13 days at \$3.00 per month—" May I correct that? Did I say 13 or 12 days?

The Reporter: 13.

The Witness (Continuing): "——12 days, \$193" even. "10 loads green alfalfa, 3 tons per load, at \$5.00 per ton, \$150."

Q. (By Mr. Cranston): And what is the total of those items?

A. The total of those items is \$5,632.80.

Q. And what was your percentage? [1170]

A. My percentage, at 25 per cent, was \$1,408.20.

Q. And is that figure recorded in this register from which you are reading?

A. Well, it is continued down here.

Q. Yes. But is the \$1,408.20 figure recorded there?

A. Yes, surely. That is where I am getting it.

Q. Now, then, what items follow that?

A. Then I sold the Whelan ranch in 1950, 28¾ tons of hay, at \$25 a ton, \$718.75.

I sold them 11¼ tons of hay, at \$30 a ton, \$37.50.

I sold them 9½ tons of alfalfa, at \$20 a ton, \$190, which, with the balance brought forward from the former alfalfa receipts, left a total due me of \$2,354.45.

I paid as my share of the floating, \$1,080. The labor in clearing the sheet piling, that was in that effort to mitigate damages, was \$62.70. The labor in

(Testimony of Adolph G. Sutro.)

installing that same device was \$272.09, amounting to \$1,314.79, and leaving a net balance due me of \$1,039.66, which was deposited on that date.

Mr. Abbott: May I examine the record, please? I would like this marked for identification, the check register from which the witness has last read.

Mr. Cranston: If the court please, this is the check register which is Mr. Sutro's current check book, incidentally, and I hate to have it here in court. We have no objection to counsel making any copies that he may wish from it. [1171]

Mr. Abbott: Your Honor, if it becomes necessary to keep it part of the record after the close of the hearing, I am sure we can stipulate to making photostatic copies for the pertinent pages and return the original record to the plaintiff.

Mr. Cranston: He will need it even during the rest of this hearing.

The Court: That is your current check book?

The Witness: Yes, your Honor. That is my check book.

The Court: I don't think you will need it on the stand.

The Witness: I mean that is the check book I use daily.

Mr. Abbott: These figures are very interesting, your Honor, and I will want them in the record.

Mr. Cranston: We have no objection to your photostating them.

The Court: You can make photostats of them during the trial, so that he can use his financial rec-

(Testimony of Adolph G. Sutro.)

ords. I don't think we should tie up those that are not essential here.

Mr. Abbott: Very well. Will this book be available during the remainder of the trial?

The Court: Yes. We will mark it here for identification, with the understanding that it may be withdrawn recurrently, providing it is done in the presence of both counsel.

Mr. Abbott: That is agreeable to the government, your [1172] Honor.

The Clerk: That will be Defendant's Exhibit AA, for identification.

(The exhibit referred to was marked Defendant's Exhibit AA, for identification.)

Mr. Cranston: Do I understand the entire book is marked for identification, or just this entry?

The Court: I don't know whether the entire book. I haven't looked at this at all.

Mr. Cranston: There are literally hundreds of entries in there.

The Court: I think the whole of the instrument which was used in the testimony should be marked for identification. Counsel seems to think there is some significance to it that has not appeared as yet.

Mr. Cranston: The whole of that page certainly may be marked.

The Court: I am not going to extend this trial to permit a further investigation on a matter of that kind. I want that understood by the government right now.

(Testimony of Adolph G. Sutro.)

Mr. Abbott: May we go into the matters appearing in this record, your Honor?

The Court: You can go into any matters that they have gone into.

Mr. Abbott: I might point out, your Honor, that in the [1173] course of the examination yesterday we asked for original records, and this book, which does appear to be an original record, was not produced by the plaintiff, and has never been seen by the government before this morning.

Mr. Cranston: Now, Mr. Sutro——

The Witness: This book with these entries——

The Court: Now, if you are going to say anything, say it so that the reporter can hear it, and if she hears it, we can all hear it.

The Witness: Excuse me, your Honor.

This ledger, with these page references, was in the possession of the government yesterday.

Mr. Abbott: The reference was to original books of entry.

Q. (By Mr. Cranston): Mr. Sutro, this account No. 15 contains certain additional entries. What is the next entry on this page?

A. December 30, 1952, 31.9 tons alfalfa hay, at \$32 per ton, 25 per cent, \$252.35.

Q. And 25 cents, I believe.

A. 25 cents. Please excuse me.

Q. The next entry is in 1953, which I take it is excluded by the court's ruling.

Turn to the next account sheet in this ledger, which is entitled, "Rental of pasture." Will you

(Testimony of Adolph G. Sutro.)

read the entries [1174] contained thereon?

A. February 27, 1948, rental of pasture, \$366.25.

Q. And is that the only entry in 1948?

A. There is a journal entry. You mean a credit entry?

Q. That is the only receipt? A. Yes, yes.

Q. The other is a bookkeeping entry to profit and loss? A. Yes.

The Court: I see no advantage in discussing ledger entries that are not different from figures testified to yesterday.

Mr. Cranston: The only purpose, your Honor——

The Court: It is prolonging the case unnecessarily, that is all.

Mr. Cranston: The only purpose was to give the government all the information which we had. In view of your Honor's ruling, we will not proceed further into it.

Q. (By Mr. Cranston): I will ask, Mr. Sutro, however, if the entries contained in this ledger are complete and show all your receipts from the operation of this property.

A. With the exception of \$117.

Q. Now, you have referred to that several times. I show you a check of Rex McDaniel, dated August 7, 1950, for \$117.50, and ask if that is the check to which you have referred. [1175]

A. That is the check to which I have referred.

Q. Has it ever been cashed?

A. No. There was a dispute between Mr. McDaniel and myself over the amount of this check.

(Testimony of Adolph G. Sutro.)

It was a customary dispute between a landlord and a tenant, except it was exactly in reverse. Mr. McDaniel wanted to pay me more money than I wanted to take, so he wouldn't take his check back, and I wouldn't cash it. And that is the situation.

The Court: Has there ever been an entry made in the check book?

The Witness: No, the check has never been cashed, and, of course, it is now of stale date.

Q. (By Mr. Cranston): In other words, you have never received any money upon this check?

A. No. Mr. McDaniel would not take it back, and I just left it.

The Court: He testified to that yesterday.

The Witness: Yes.

Mr. Cranston: I will ask to have this check marked for identification.

The Clerk: Plaintiff's Exhibit 49, for identification.

(The check referred to was marked Plaintiff's Exhibit No. 49, for identification.)

Q. (By Mr. Cranston): You testified that you had received a certain portion of your crop rental in kind, and [1176] later sold that portion. Is the income received from the sale of that portion of your crops contained in the entries which have been referred to?

A. Any moneys received in the form of cash were deposited in the bank. All withdrawals are by check.

The Court: Then is the recordation of those

(Testimony of Adolph G. Sutro.)

transactions entered in this book? That was the question.

The Witness: If it was cash, it went in the books. If it was sold for cash, it went in the books. Does that answer the question?

The Court: I don't know whether it does or not.

Q. (By Mr. Cranston): Have you received anything of value, either crops in kind or in cash, which is not referred to in these books?

A. No, with the exception of that \$117 check.

Q. Mr. Sutro, did you incur certain expenses for disking, grading, spraying, seeds and fertilizer on this property during the period that you have owned it?

A. Yes.

Mr. Cranston: Your Honor, I wish to make clear at present what I intend to show by this evidence, and see if this would be permitted, in view of your Honor's statement yesterday when I made a general offer of proof.

My offer now—what I would propose to prove by Mr. Sutro—is that during this period for direct labor in growing [1177] cover crop, for disking, for spraying during this period, he spent certain sums. This involves nothing for traveling expense, nothing of any other nature. It is our position that since the government has gone into the gross receipts, we should be permitted to go into the expenditures.

Now, as I say, I do not wish to go into that if your Honor believes the ruling yesterday precludes it, but it is my understanding that that was entered at a time when no income had been charged to Mr.

(Testimony of Adolph G. Sutro.)

Sutro from the property, and we are entitled to show this as an offset to that income.

Mr. Abbott: The government has two objections, your Honor. The first is the comprehensive objection to the offer of proof yesterday, which included, but was not limited, to this offer.

The second objection is this: That the purpose of the government's inquiry has been to disclose facts which may be material to the ascertainment of rental value. We are not interested in the actual income unless it exceeds rental value, and no such evidence has been produced to date.

The Court: Suppose you ask a question so as to inform the court as to the items, or the character of the items that you have in mind.

Q. (By Mr. Cranston): Mr. Sutro, did you incur expense for labor in growing crops, and in preparing your property for the growing of crops during the year 1946? [1178] A. Yes.

Q. Do your books indicate the amount of such expense? A. Yes.

Q. What was it?

Mr. Abbott: Now, I will object to that, your Honor, on the grounds previously stated, and on the additional ground that the growing of crops is a commercial venture.

The Court: Objection sustained. Not on the ground that it is a commercial venture, however, because that would not be decisive as such, but upon the other grounds stated and discussed by the court previously. The entire case has a commercial flavor.

(Testimony of Adolph G. Sutro.)

Farming, as it is concerned in this case, is a commercial venture, not a pastime or a part of the recreational activities of the landlord.

Mr. Abbott: My expression was rather elliptic, your Honor. The thought was this, your Honor, that this is not an item in mitigation of damages. It is not something that he did to minimize loss. It was something he did to make a profit.

Q. (By Mr. Cranston): Mr. Sutro, you testified yesterday, I believe, that on the pasturage payments for cattle, they were on a per head basis, and that in one instance you believed the amount per head was \$3.00. Is that correct? A. Yes.

Q. Did you receive the entire \$3.00 per head, or a portion [1179] thereof?

A. No, I would receive a portion thereof, because the stubble—the crop would belong to the tenant, so I would receive a portion of the pasture rent.

Q. You were asked yesterday concerning a lease to Mr. McDaniel. You testified that you believed it was in evidence in this case. I show you Exhibit 25, which was introduced, and ask you if that is the lease to which you referred. A. Yes.

Q. You testified also that Mr. McDaniel had to haul his equipment back and forth and that increased his operating expenses. Why did he have to haul the equipment back and forth?

Mr. Abbott: That will be objected to, your Honor, as immaterial. He has testified as to the proceeds of the crop, which would be the only aspect of the relationship immediately relevant.

(Testimony of Adolph G. Sutro.)

The Court: Isn't that reflected in the figures?

Mr. Cranston: The net amount received is reflected in the figures, but I believe the expenses incurred by Mr. McDaniel or the need for hauling equipment back and forth is an indication of the difficulties in operating this property during this period.

The Court: Oh, I think that is an immaterial situation. If we went into all of those matters we would be here for four [1180] years longer.

Mr. Cranston: Very well.

Q. (By Mr. Cranston): Mr. Sutro, you were asked why you had not pumped water from the well in order to save the alfalfa crop in the year 1952 after the Navy ceased the discharge of the effluent into Pilgrim Creek. Can you state what would be involved in such an enterprise?

A. May I ask to which well you are referring?

Q. As to any well.

A. If the wells did not have a sufficient capacity to irrigate by flood irrigation—or, may I start all over?

The alfalfa fields had been laid out, and the checks so constructed as to necessitate a large or comparatively large volume of water being placed on them, a larger volume than the wells by themselves would produce. In other words, it was necessary that storage facilities be provided. It would have required a storage reservoir of a temporary nature, pipelines of a temporary nature, the obtaining of another pump—it is more or less delineated in that letter

(Testimony of Adolph G. Sutro.)

which was sent you—the obtaining of another pump, and if it were desirable to use the new well, the extension of the power lines.

Q. Did you believe such an expenditure was justified?

A. I could see no way that I could amortize my costs during its probable life, and I had no means of determining what its probable life should [1181] be.

Q. You stated that at one time because of the losses sustained as a result of the government's acts, you believed you might have to forego the erection of your residence. Did you ever abandon the plan to erect a residence?

A. No, but I figured that I might have to postpone it.

Q. And do you still plan to build it?

A. Yes.

Q. What size? With two bedrooms?

A. Yes.

Q. Mr. Abbott asked you yesterday concerning the size of the residence. Calling your attention to Plaintiff's Exhibit 44-I, and in particular to the room marked "Library," I call your attention to a portion designated "File." What does that indicate?

A. That indicates a closet of a special size to accommodate a large filing cabinet which I own.

Q. What is the space next to the filing cabinet designed for?

A. That was designed for the customary stationery and business supplies.

(Testimony of Adolph G. Sutro.)

Q. There is a dotted line near that. What does that represent?

A. That represents quite a bit of argument with the architect over putting a drawing board or drafting board into a library. But, nevertheless, I had my drawing board placed [1182] here near the north light.

Q. What is the place in the area marked "Book Shelves"? A. My library.

Q. What is the nature of your library?

A. Largely technical.

Q. What was to be placed in an area marked "Map Cabinet"?

A. This size, 41x38, fits a blueprint cabinet which I already possess, and which would fit in here without any further construction.

Q. What was the purpose of placing these items in the library?

A. I figured on transacting my affairs there.

Q. I call your attention to two rooms at the other end of the house.

A. May I make that clear: I didn't expect to have every Tom, Dick and Harry piling in there, but I did expect to use it for purposes for which a library is more or less used, in combination with a, shall we say, private office.

Q. I call your attention to a room marked "Utility," and ask you what was the purpose of that room?

A. That had a chopping block, and special tables, and everything. It was intended to use that for the

(Testimony of Adolph G. Sutro.)

processing of any farm crops for the benefit of the people living on the ranch. [1183]

Q. I notice that appears to be more or less tied into and yet separated from the balance of the property.

A. Yes, it is completely separate from the house. It is an adjunct of the cold storage room.

Q. And what was the cold storage room for?

A. For the same purpose, for keeping food products for the people on the ranch.

Q. And what was this compressor room for?

A. That was for the refrigeration equipment.

Q. You have been asked concerning the number of tools in your repair shop. What are the facilities for the repair of machinery and equipment near to your property?

A. Practically non-existent.

Q. What repairs did you wish to perform upon your tools with this equipment?

A. Anything which might be necessary.

Q. Yesterday you were asked if you could estimate the acreage of various areas which had been planted. I call your attention to Plaintiff's Exhibit 32, particularly, to an area near the south portion of Pilgrim Creek, and to the east thereof, south of field No. 6, which had been planted by Mr. Brown at the time you purchased the property, and ask if you had estimated the area contained in that field.

A. Yes.

Q. What did you estimate it to be? [1184]

A. I was attempting to be conservative, and I

(Testimony of Adolph G. Sutro.)

estimated it at four acres. It appears on our records, I believe, as Field X, the unknown quantity, if I remember rightly.

Q. What is the actual acreage of that field, according to your best information?

A. I talked to a soil enginer last night, who had just completed a survey, and he told me it was 6.88 acres.

Q. And that field, which is not marked on this map, lies to the south of Field No. 6; is that correct?

A. Yes. There is an intervening row of hills.

Mr. Cranston: That is all, Mr. Sutro.

Recross-Examination

By Mr. Abbott:

Q. Mr. Sutro, are there any automotive garages in the city of Oceanside? A. Yes.

Q. How many? A. I never counted.

Q. How far are those from your ranch?

A. Oh, about the same distance as Vista; around six miles, I would estimate.

Q. Do you recall testifying that the total receipts from the alfalfa crop grown on your land by Miss Whelan—the proceeds to you were \$1,039.66?

A. May I look at the report from which I was testifying? [1185]

Mr. Cranston: I think I have a copy of it, Mr. Sutro.

The Court: I don't believe it is so much a question of what he recalls testifying. Ask him what he

(Testimony of Adolph G. Sutro.)

did testify to, if you know what he testified to.

Mr. Abbott: The question is really preliminary, your Honor.

Q. (By Mr. Abbott): Did you testify to a rental of that sum?

A. May I check what this report shows, and then I will tell you, because this is what I was testifying from. What date, Mr. Abbott?

The Court: 1950, Whelan.

The Witness: 1950. I testified I had received \$1,039.66 income, hay. That is what this report says, and this is what I was testifying from.

Q. (By Mr. Abbott): Well, looking at this, what appears to be an original record, a check register now marked for identification, the figure to which you testified yesterday is a net figure after several arithmetical computations were effected, is it not? A. Yes.

Q. It is not the gross proceeds of the crop received from Miss Whelan, is it?

A. It is this figure.

The Court: Well, I can't see that. [1186]

The Witness: Excuse me, your Honor.

The Court: Read it.

The Witness: \$1,039.66. Mr. Abbott, may I point out one thing to you: I told you yesterday I had nothing to conceal. A man does not ask for a congressional investigation——

The Court: Just a minute, now.

The Witness: ——if he has anything to be ashamed of.

(Testimony of Adolph G. Sutro.)

The Court: Mr. Sutro, you will have to stop, and answer the question.

The Witness: Excuse me, your Honor. I apologize.

The Court: This could go on, and on, and on.

The Witness: Excuse me, your Honor. I merely said you don't ask Congress to investigate——

The Court: Just a minute.

The Witness: Excuse me.

Q. (By Mr. Abbott): Mr. Sutro, there is nothing personal intended in any of the questions I ask you. I am here to represent the government, and to endeavor to ascertain the facts.

A. I am only too happy to give them to you, to the best of my ability.

Q. Very well. Let's briefly go over the computations of that figure. In your original books of entry I find the following items used in its computation: 28¾ tons of hay, at \$25 per ton, under the heading of "Sold Whelan Ranch 1950"——

A. Wasn't this read a moment ago, Mr. [1187] Abbott?

Q. No, sir. Your counsel, or you read, in response to your counsel's question, from the left-hand column.

A. No, I read the entire thing, Mr. Abbott, from the beginning to the final conclusion.

Q. All right. I stand corrected. The question I am getting at is this: What was the source of the hay sold to the Whelan Ranch in 1950?

A. Well, it was either their own hay, or hay that

(Testimony of Adolph G. Sutro.)

McDaniel had left over. I can't tell by looking at that.

Listen, it was hay produced on the property, whether Whelan produced it or whether McDaniel produced it. I can't tell by looking at a bale of hay who the grower was.

Q. But it was your hay, was it not?

A. Yes, it was my hay.

Q. And is the same thing true of the second hay item of \$37.50, and for the alfalfa item of \$190?

A. Well, I couldn't have sold it, if it wasn't mine.

Q. Then all of that was income from the ranch, was it not, Mr. Sutro?

A. I would so consider it.

Q. Then the gross proceeds of crops grown on the ranch received by you on November 15, 1951, was the \$2,354.45, was it not?

A. I believe that was testified to just a few moments ago, when this record was read. [1188]

Q. You testified yesterday, Mr. Sutro, and your testimony was, was it not, that the proceeds received at that time were \$1,039.66, a figure of less than one-half of the earlier figure?

A. May I call to your attention that you had my ledger. I was reading from this report.

Q. I will show you this document I had, and I will ask if you can show me the figure we have just been talking about in that document.

A. Pardon me for grinning, Mr. Abbott. I assure you I am not in any way doing it disrespectfully.

(Testimony of Adolph G. Sutro.)

It is merely attempting to get me to answer accounting questions.

Q. I asked for this record yesterday, as the record will show.

A. What page are you looking for, Mr. Abbott?

Q. You said that I had the record which would show.

A. I said you had this ledger yesterday. I don't know what is in it. Hay was account 15.

Now, what is your question?

Mr. Abbott: Now, does this ledger which I have——

The Court: Just a moment.

Mr. Abbott: Yes, your Honor.

The Court: You did ask him a question as to gross income, and I think that Mrs. Zellner can look it up and read it.

Mr. Abbott: Can you do that, Mrs. Zellner, at this time? [1189]

(The record referred to was read by the reporter, as follows):

“Q. Then the gross proceeds of crops grown on the ranch received by you on November 15, 1951, was the \$2,354.45, was it not?

“A. I believe that was testified to just a few moments ago, when this record was read.

“Q. You testified yesterday, Mr. Sutro, and your testimony was, was it not, that the proceeds received at that time were \$1,039.66, a figure of less than one-half of the earlier figure?

(Testimony of Adolph G. Sutro.)

“A. May I call to your attention that you had my ledger. I was reading from this report.

“Q. I will show you this document I had, and I will ask if you can show me the figure we have just been talking about in that document.”

The Witness: Yes, apparently that is correct, and apparently the ledger shows the net receipts.

The Court: What do you mean by “apparently”?

The Witness: It does show the net receipts. I am very careful regarding my statements regarding accounting, your Honor.

Mr. Abbott: Your Honor, I will ask to put in evidence the particular sheet in the original record, the check register which has been the subject of this inquiry, and the particular [1190] sheet in the ledger, and offer them as the government's next in order.

Mr. Cranston: There is no objection, your Honor, if later photostats may be substituted so that the original records may be removed by the plaintiff.

The Court: Surely, and the photostats should be furnished by the government, and not by the plaintiff. The books will be left here with the reservation that the court has previously stated, they being current check books which the witness states are necessary for use in his business, current business, and I don't suppose even the government wants to tie up the man's business, unless it is material to the

(Testimony of Adolph G. Sutro.)

subject matter of the trial, and current matters are not material. The court has definitely ruled as to the decisive dates.

(The exhibits referred to were received in evidence as Defendant's Exhibits BB and CC.)

Mr. Abbott: We are anxious not to inconvenience anyone in this respect, your Honor. I only wanted the particular pages, and those will be photostated by the government, and if counsel is agreeable, the photostats will be substituted for the particular pages referred to, and the government will stipulate to the withdrawal of the original records. I do think these records are most important, in view of the witness' testimony yesterday, your Honor.

I have no further questions at this time. [1191]

Redirect Examination

By Mr. Cranston:

Q. Mr. Sutro, just one question or two. You were asked yesterday about accounting in general, and the accounting for the Sutro Baths. What accounting system was followed for the Sutro Baths?

A. Well, as I am a little doubtful about my accounting ability, I put in a very complete, comprehensive accounting system, which was kept up to the minute, and a system which independent auditors, when they have come in, have always uniformly praised for its completeness and its accuracy, and the fact that almost any information necessary could

(Testimony of Adolph G. Sutro.)

be obtained from it. However, that didn't help me particularly.

So, as far as my personal reports on the business were concerned, we had many departments, we had many accounts, we had many various things, which required rather close watching, and I had all my operating accounts transferred to graph paper in a book the same size you are using, Mr. Cranston. There were about 15 of them.

The graph was posted weekly. We will say, as of today the graph would show the gross receipts to this day. It would also carry on the same page the receipts for the entire year 1953. I think that preceding year was green. It would also carry the entire receipts for the year preceding that, which would be 1952. I think that was a red line. [1192]

By looking at one chart, I could tell my receipts any time during the preceding three years, and which way the trend was, and if there was any noticeable change from the normal expectations at that time of the year.

That system was carried through all my operating accounts, from fuel oil consumption, the receipts of the various departments, the payroll, and so on, so that I could get a complete picture of my entire business in less than 15 minutes.

Apparently, there must be some merit to the system, because the people who took over the business continued it, and I am told that about three months ago they hired my auditor to go into their

(Testimony of Adolph G. Sutro.)

business and install the same method of graphic presentation of all operating accounts.

Q. Then you examined the graphs and not the books in connection with the Sutro Baths' operations?
A. That is correct.

Q. Did you deem it feasible to install a graph system for receipts and disbursements on this property?

A. Not for a salvage operation, although I can tell you when we operate a vegetable business, there will be a cost accounting system there that will be a dandy.

Mr. Cranston: That is all.

Mr. Abbott: That is all.

The Court: I think we will take our recess now for a [1193] few minutes.

(Short recess.)

Mr. Abbott: Your Honor, the clerk has asked that I further identify the government's last offer.

Exhibit BB, last offered by the government, consists of a single page, unnumbered, in a book entitled "Ekonomik Check Register," which page is headed May 28, 1951.

Government's Exhibit CC consists of a single page in what appears to be a ledger. The page is headed, "Account No. 15." Opposite the printed word "Name" appears the handwritten entry, "Income—Paid." The page can be further identified as lying just behind tabular marker "I" in the ledger.

Mr. Cranston: Do you mind if I call Mr. Sutro

for two questions in connection with these last exhibits?

The Court: I don't think so.

Mr. Cranston: I wanted to inquire into the handwriting, that was all; not to go into detail.

The Court: No, later on it can be supplied, if necessary.

(Witness excused.)

Mr. Cranston: Mr. Burlake. [1194]

JOHN MICHAEL BURLAKE

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: John Michael Burlake, B-u-r-l-a-k-e.

Direct Examination

By Mr. Cranston:

Q. Will you state your name, please?

A. My name is John Michael Burlake.

Q. And what is your profession or occupation?

A. I am an appraiser.

Q. What position do you hold at the present time?

A. I am associated with the American Appraisal Company, whose headquarters are in Milwaukee, Wisconsin, and for whom I am the West Coast or Pacific Coast Production Manager.

Q. What school or college did you attend?

(Testimony of John Michael Burlake.)

A. I attended Worcester Polytechnic Institute, Worcester, Massachusetts, from which I graduated as a Bachelor in Civil Engineering in 1929.

Q. What did you do after graduating from Worcester Polytechnic Institute?

A. I joined the American Appraisal Company, and have been associated with them continuously since 1929, excepting for 44 months in military service. [1195]

Q. Will you state what your duties were for the American Appraisal Company?

A. When I joined the company I was one of a class of engineering appraisal students, and I spent about 1½ years in this position, during which time I had formal classes and practical application of appraisal principles, as taught and practiced—as taught to me, and as practiced by the company in both field and office; in the making of inventories of structures and industrial plant equipment; the application of unit costs to them; and the observation and recording of factors of depreciation; also, the filing of these processes through the office, which involved the operations of checking field work, the application of the major part of unit costs, in addition to those already applied in the field, and otherwise following the appraisal field papers through to the compilation of the report. That was the general scope of the training period.

Following that, for about a year, I was a staff field appraiser, continuously engaged in the field oper-

(Testimony of John Michael Burlake.)

ations of inventorying and evaluation of property, largely industrial and commercial.

Then for a period of about seven years I was located in the home office at Milwaukee, and there I did research work in the investigation of construction cost data, the construction of unit costs from the analysis of the available data, and the [1196] application of those unit costs on certain specific and special problems. This occupied me for about two years, comparatively full time.

From then on I had general responsibility for the execution of research work, under the supervision of a vice president of the company, and this research went into all matters of special problems and field procedures that had to do with special industries that presented economic or operating or depreciation problems.

I was, during this period, still active in the actual work of making appraisals and the estimating or applying of unit costs, as necessary, on these particular special assignments that I undertook.

I otherwise assisted the officers of the company in the reviewing and checking of the field work done by others on specific appraisal problems, where values were involved, and wrote reports.

I had charge and responsibility for the development of instructions for field procedures. I hired personnel, and I supervised them in their initial training periods.

Generally, that accounted for the period from

(Testimony of John Michael Burlake.)

about 1932 to 1939, and on into 1942, when I entered the service.

Q. During this time did you do appraisal field work?

A. I did considerable appraisal field work in various parts of the country, including California, in which I executed [1197] a number of engagements at that time, more precisely from about 1935 to 1936 and to '39.

Following upon the completion of my service with the Armed Forces, I located in Northern California and was senior appraiser in charge of or responsible for the production work carried on in that area, and also was active upon special engagements in Southern California.

During the past, approximately two years, I have been located in Southern California, with offices at 210 West Spring Street in Los Angeles, and I am responsible for the conduct of all appraisal matters having to do with field execution and processing of such reports as are issued from the local office.

Q. How many men are on your staff?

A. At the present time I have about 10 or 12, depending upon whether certain individuals have gone to an eastern assignment or not.

The Court: Did you say 210 West Spring Street? I can't orient myself.

The Witness: 210 West Seventh Street. I beg your pardon. Thank you.

Q. (By Mr. Cranston): Do you plan and supervise the work in this office?

(Testimony of John Michael Burlake.)

A. I do. I have full responsibility for the planning and staffing and supervision of execution and the necessary [1198] checking operations and final processing, to the point where on reports issued from the local office, I apply my signature.

Q. In the work which you do in connection with appraisals, is the matter of reproduction cost involved?

A. Almost invariably, in an appraisal which involves valuation of tangible property, reproduction cost is involved. It may not be the ultimate determinant, but in any case it is at least a starting point.

Q. Have you in the past, testified, or done work in connection with appraisals for litigation involving the motion picture industry?

A. I have. I was active in the recent case between the Department of Water and Power and the Metro-Goldwyn—oh, I beg your pardon—the Goldwyn Studios, in which I conducted the investigation on the inventorying of the property and the cost of reproduction figures used by others in arriving at valuations.

Q. Have you testified in other actions involving appraised valuations?

A. I have. Recently in a case involving the value of a lumber—retail lumber and building materials company, as to the land, buildings, equipment inventory, and business value.

Q. Have you contributed to any texts dealing with appraisals?

A. During 1939 I contributed six or seven chap-

(Testimony of John Michael Burlake.)

ters to a [1199] text then being prepared by the American Institute of Real Estate Appraisers. These chapters had to do primarily with the physical improvements of commercial properties, and the factors of investigating them for condition and such requirements as alterations and rehabilitations, to be used in processing a value estimate.

Q. Do these involve buildings and improvements upon the property? A. They do.

Q. Can you tell us something about the American Appraisal Company for which you work?

A. The American Appraisal Company is a personal service organization, established in 1896, and since then continuously engaged in the investigation and valuation of property.

It has currently a staff of about 600 employees, of whom the major part are of specialized training and experience in the conduct of field investigations, the determination and application of unit costs to both construction and equipment, and the necessary other operations, up to the typing of a report.

It maintains continuous research and contact with manufacturers, distributors, dealers in equipment and building materials, and it processes this data and applies it to the inventories produced by the field staff.

During the approximate 60-year period of our existence, [1200] there have been in excess of 100,000 separate properties appraised by us for all manner of clients, including various instrumentalities of national, state and local governments, and for all of

(Testimony of John Michael Burlake.)

the various purposes for which a property investigation as to the extent, character, condition or value of property might be involved.

Q. Does the company retain in its files all working papers?

A. We retain all working papers, and also all cost data at any time assembled for the historical purposes that occasionally arise in the making of valuations.

Q. And do these cost figures which the company has maintained, go back to the year, 1895?

A. They go back to the year, 1895, and prior to that.

Q. Has the American Appraisal Company acted as sole appraiser or arbiter of value in various cases?

A. To my knowledge, the American Appraisal Company has acted in the capacity of sole appraiser in numerous cases, although it may not necessarily be true that the agreement to so act was necessarily a formal legal document, but it might have been a meeting of the minds in more cases than not, where we have made appraisals which were to be the sole appraisals upon which an action, such as a judicial sale or other negotiation was to be conducted.

Q. Did one such recent incident here in Southern California [1201] involve an aircraft factory?

A. Well, it happened to be in Tucson, where we made an inventory and appraisal of a substantial aircraft factory upon the agreement of the two interests involved that we would be the sole appraisers.

(Testimony of John Michael Burlake.)

Q. Does the American Appraisal Company itself own any real property?

A. No, we do not. We do not own, operate, buy, sell or build property, with the exception of our office furniture, fixtures, supplies and records.

Q. Does the American Appraisal Company, during the course of its operations, appraise buildings which have recently been completed, and what is the purpose for such appraisals?

A. In the normal course of our operations, we appraise property which has been completed at any time in the past, and is still in existence, and that would include buildings that are recently completed, and in some cases are in the course of construction.

Q. What is the purpose of such appraisals, and what use is made of the information derived therefrom?

A. The purpose of an appraisal of a building recently completed is normally either because it is a part of the whole, of which it is possibly a relatively small part, or it may be, of course, a single building in which the determination and [1202] classification of the costs may be desired.

I may explain: When a structure is erected and equipped, there may be only a single cost available to the owner, and for purposes of analysis and operating reasons he may want a distribution of those costs to the respective parts of the building and the equipment that goes with it. In such case, an appraisal is of definite service.

Q. At the time the appraisal is made, do you take

(Testimony of John Michael Burlake.)

into consideration the actual cost of the building which has recently been constructed in such a case?

A. We consider all evidence that we have. We have occasion at times to analyze the actual costs, based upon such cost data as is available from the contractors, and their billings, and otherwise, other types of records that may have gone on to the owner, into the owner's possession.

Of course, in any case where there is a substantial disagreement between our appraisal and the record of costs, we make necessary analyses to determine what the causes of the disagreement may be, both as a matter of checking on our own processes and units of cost, and also to resolve the issue, because the owner may want to know.

Q. Mr. Burlake, have you been called upon by Mr. Sutro to make such analysis as to the cost of erecting certain buildings and improvements as of the year 1946, and as of two dates in 1953 and in 1952? [1203]

A. We were; or we did, whichever the question was.

Mr. Cranston: If the court please, I will ask to have this document marked as our next exhibit for identification at the present time, and I will hand counsel a copy.

The Clerk: This will be Plaintiff's Exhibit 50, for identification.

(The document referred to was marked Plaintiff's Exhibit No. 50, for identification.)

(Testimony of John Michael Burlake.)

Q. (By Mr. Cranston): I show you the document which has been marked Plaintiff's Exhibit 50, for identification, and ask you if this is the report which you prepared pursuant to this request.

A. This is the report, and it carries my signature.

Q. And I notice you have a document in front of you.

A. I have a carbon copy of that.

Q. I will first ask you this question: When Mr. Sutro first asked you to make a report, what was the second or final date which you were asked to consider?

A. The second date was July 21, 1952. I may verify that, because a day off may be pertinent or not.

Q. I believe that——

A. July 21, 1952, is the date.

Q. I believe you probably misunderstood the question, or it was not properly phrased. You were asked originally to make appraisals as of 1946, and as of what other date? [1204]

A. Oh, I'm sorry. As of approximately the third quarter of 1952.

Q. 1953, wasn't it?

A. Or 1953. I beg your pardon.

Q. Calling your attention to the page marked 1 in this report, you, on January 29th, actually made a report giving certain figures showing the increase between 1946 and 1953; is that correct?

A. That is correct.

Q. And then were you later requested to make

(Testimony of John Michael Burlake.)

additional findings and to render a report showing the increase in cost to July 21, 1952?

A. Yes, we were; almost immediately thereafter.

Q. I believe it was the same afternoon. Will you state the method in which your findings have been incorporated into this volume, that is, the mechanical make-up of the volume?

A. The mechanical make-up is based upon a letter transmitting the results and premises of our investigation; a summarized statement of the comparative costs, arranged by classification of property, bringing together the total costs for property of substantially like kind and character, followed by an inventory which presents the technical description and identification of property units or groups of units with the comparative costs for each such item of property set out in the inventory as of the one date or the other which is being [1205] compared.

Now, the request for a comparison as between 1952 and 1946 was complied with, and implemented by a set of addenda sheets here in this report, which are in all cases identified with a letter suffix to the page number, and follow the originally compiled sheets, and set out the 1952 versus 1946 comparison of the same data that was presented in the preceding sheet as of the earlier date selected, or the date selected earlier, between 1953 and 1946.

Q. Do these later pages, which contain the 1952 information, contain the details as to specific items

(Testimony of John Michael Burlake.)

included under general headings, or do they refer to the previous pages?

A. They refer to the previous. They are heading identifications, you might say, or brief identifications, which do not repeat all the detailed technical description, but are in sufficient detail only to positively identify the item.

Q. Yes. Now, will you state, Mr. Burlake, the procedure which was followed in preparing this report, what investigation was made, and what information you relied upon?

A. In executing this report, I assigned our Mr. J. W. Lennis to proceed to the property, and to investigate the information available therefrom, and to obtain such additional information as was necessary, and which Mr. Sutro furnished us.

The information furnished by Mr. Sutro consisted of such drawings, blueprints, designs and specifications as were in [1206] existence, supplemented by the necessary discussions to elaborate upon them where they were not precisely clear and complete, and from this information, then, the quantities, type, kind, and quality of materials used were assembled into our working papers, and in inventory form, and they were susceptible to the application of detailed unit cost.

Q. Have you yourself also been upon the Sutro property?

A. Yes, I myself spent a morning on the Sutro ranch, following upon the stay of Mr. Lennis, and I myself followed through in all necessary checking

(Testimony of John Michael Burlake.)

operations and consultations with Mr. Lennis, and particularly, more particularly, on the improvements such as irrigation works and similar matters that were not the frame structures on the property.

I would say, if I may add an explanation, that Mr. Lennis was instructed to make the appraisal of the building improvements as such primarily, and I accepted the responsibility for checking him on that phase of the work and carrying on the balance of it.

Q. Now, you have here certain documents. Are these the references and notes which you used, and certain drawings and maps?

A. They are. These are the documents that I brought in this morning, and which were used in the execution of the work, although they are not complete here, because some had, of necessity, been returned to Mr. Sutro for the use of others. [1207]

Mr. Cranston: May it please the court, I was going to show the witness these various exhibits which have been introduced in evidence. He has examined them. I do not wish to inconvenience the gentleman who is looking at them now, but, for the sake of the record, I want the record to show that he examined the exhibits. If counsel will stipulate to that, all right. Otherwise I will have to show him the documents.

Mr. Abbott: I will stipulate he has seen the documents in evidence.

Mr. Cranston: Then that stipulation would cover the fact that Mr. Burlake has seen the documents

(Testimony of John Michael Burlake.)

introduced into evidence as Plaintiff's Exhibits 38, 39, 44-A, -B, -C, -D, -E, -F, 44-H and -I, I-1, I-2, I-3, I-4, 44-J, 44-J-1, 44-K 44-K-1, and 44-M. That is, they are the original blueprints, the topographic maps, the grading plans and specifications, these documents which have been introduced into evidence.

Mr. Abbott: We will stipulate that the documents were shown to the witness, and he would testify he has seen them.

Q. (By Mr. Cranston): From the drawings and examination of the ground conditions, what did you then do?

A. We made further investigation locally as to the prevailing rates of pay for construction labor and construction materials as of the respective dates that were to be involved in the work. We, from this data, determined or constructed our unit costs to apply to the inventory of the quantities of [1208] materials and construction and equipment that was evident from the available records, plans and data. We——

Q. Pardon me?

A. We consulted, as I said, with building material people, and I meant to say with local building material dealers, and with sources of labor information. We checked this information obtained in this manner against information already in our files and records, as accumulated on prior work done in the same locality for others.

Q. And did you check with the records in your home office on occasion?

(Testimony of John Michael Burlake.)

A. In this particular case we did not check with the records in our home office on building material costs or wage rates, because we have a local record of anything that has been transmitted to the home office, so that we had the initial data already for the checking purposes.

Q. Did you—or, I will ask you this: How did you obtain the dimensions, sizes, the number of lineal feet for different substances which would be used in the construction?

A. Those matters were determined from the dimensions as shown on drawings or the scaling of scale drawings, which were not dimensioned in detail otherwise, so that, generally, for a structure the dimensions were evident from the drawings and were checkable by scaling. For items out in the field, such as irrigation works, Mr. Sutro in some cases—— [1209]

The Court: Pardon me just a minute.

The Witness (Continuing): ——Mr. Sutro had in some cases furnished us with his take-offs of quantities, and we checked those by presumably repeating the same operation, by scaling, or counting, or otherwise measuring from the drawings, and thereby determining independently the reasonableness of those quantities.

Q. (By Mr. Cranston): Now, your original computations were made to determine the difference between 1946 and 1953, in the manner you have related.

A. That is right.

(Testimony of John Michael Burlake.)

Q. What did you do, then, when you were requested to obtain the information as of 1952?

A. We made a turn-about and repeated the investigation that already had been made for 1953 conditions to apply as of 1952, which meant in many cases going back to sources of information, who were individuals or vendors, and re-examining the selling price of an item as of the earlier date.

Q. Then the work for 1952 was not merely an arbitrary percentage of 1953?

A. No, it was not. On certain very minor items it might have been, but there was no arbitrariness about it, as to the application of percentages without investigation.

Q. Now, do the figures which you have set forth in your report include allowances for overhead and contractors' [1210] profits?

A. They do. They include allowances for construction overheads, upon the assumption that the work would be done by a contractor, or an individual who would assemble a staff the approximate equal of what a contractor would be using in the construction of a project of that size and character.

Q. Is the allowance which you have made for overhead and profit a constant allowance, or does it depend upon circumstances?

A. It is not a constant allowance because it is a factor of variable size or proportion, but necessary to arrive at the total and complete cost of a construction project.

I might illustrate in this way: If the source of the

(Testimony of John Michael Burlake.)

data is such that the cost as given to us and as used by us is directly the cost to the owner, nothing is added, as might be the case in irrigation pipe, which is furnished by pipe manufacturers on a basis of engineered and installed in the field. There we have added no factor of overhead. But in the case of a structure which involves many trades and possibly subcontractors, or the equivalent of them, and many indirect costs which cannot be assigned specifically and directly to a particular piece of material or equipment, the overheads are applicable on the basis of analyses as to what normal overheads are in such conditions.

Q. Now in determining the nature of the material to be [1211] placed in any structure or improvement, if there was no definite statement in the information furnished you as to the quality, what quality did you select?

A. We used or selected the quality that was in our experience normal for that type and character of installation. ..

Mr. Cranston: Your Honor, I think I have about concluded the qualifying questions.

The Court: You think you have about concluded?

Mr. Cranston: I think I have.

The Court: Can't you conclude?

Mr. Cranston: Yes, I have.

The Court: We will take our recess now until 2:00 o'clock.

(Testimony of John Michael Burlake.)

(Whereupon, at 12:00 o'clock noon, March 4, 1954, a recess was taken until 2:00 o'clock p.m. of the same date.) [1212]

Thursday, March 4, 1954—2 P.M.

The Court: Proceed.

JOHN MICHAEL BURLAKE

the witness on the stand at the time of recess, having been heretofore duly sworn, resumed the stand and testified further as follows:

Direct Examination

(Continued)

Mr. Cranston: I notice that in the list of documents which I referred to as having been submitted to the witness, I neglected to include Exhibits 40, 44-G, and 44-L. Will it be stipulated that the witness also saw those documents, Mr. Abbott?

Mr. Abbott: We will stipulate that if asked whether he had seen them, when presented with the documents, the witness would testify that he had.

By Mr. Cranston:

Q. Mr. Burlake, based upon the procedure which you referred to this morning on the documents which were presented to you, and the pioneer inspection of the premises, have you determined what the cost of reproduction of the six buildings which are depicted in the various blueprints would have been in the year, 1946?

Mr. Abbott: Your Honor, at this time, the government would like to make a single objection, which,

(Testimony of John Michael Burlake.)

if counsel will so stipulate, will be applicable to all the evidence to be [1213] given by this witness, and that is this objection: That the testimony called for by the question under consideration, and all subsequent questions of this witness, is evidence inadmissible because it is irrelevant and immaterial, and does not constitute the proper measure of damages under the Tort Claims Act.

We may from time to time have additional specific objections, but we would like the stipulation that that objection in particular is applicable to the entire testimony of the witness.

Mr. Cranston: That is, that the difference in building costs is not the proper measure of damages.

Mr. Abbott: Well, the objection, as I stated it.

Mr. Cranston: I will stipulate that that may be considered as made to the entire line of testimony.

The Court: The objection is overruled.

Mr. Cranston: Now, will you read the question, Madam Reporter?

(The question was read.)

The Witness: Yes, I have.

Q. (By Mr. Cranston): And what, in your opinion, would that cost have been?

A. In my opinion, that cost would have been the sum of \$43,268.

Q. And have you determined what the cost of reproducing [1214] the same buildings, according to the same plans and specifications, would have been as of July 1, 1952? A. Yes, I have.

Q. What would that cost have been?

(Testimony of John Michael Burlake.)

A. That cost as of 1952 would have been \$77,273.

Q. Are the details making up those totals set forth on pages 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20 and 21, and on pages 6-A, 9-A, 13-A, 16-A, 19-A, and 21-A of your report, which has been identified as Exhibit 50, for identification in this case?

A. They are.

Q. Based upon the same procedure and documents, have you determined what the cost of sewage for these buildings would have been in the year, 1946?

Mr. Abbott: Your Honor, in addition to the objection previously stated, there is this additional objection: That this evidence is outside the scope of the court's ruling, because by Mr. Sutro's testimony, the only plans relative to a sewage system appear on plans drafted in 1946, but with the lines relative to that system added in late 1953. Those are the red lines that appear on the ground chart.

The Court: Objection overruled.

The Witness: The answer is that I have.

Q. (By Mr. Cranston): What, in your opinion, would the cost of constructing such a system have been in the year 1946? [1215]

A. It would have been, for the portions of the sewage system outside of the building lines themselves, the sum of \$1,483 in 1946.

Q. Have you made a similar determination as of July 31, 1952?

A. Yes, I have.

Q. What would the cost at that time have been?

(Testimony of John Michael Burlake.)

A. The sum of \$2,730.

Q. Mr. Burlake, in arriving at these figures, did you consult with any public authorities?

A. Yes, I did. It was necessary because, although Mr. Sutro's data as presented to us indicated the location and size of lines and other details pertinent thereto, it did not specify the precise form or size or type of septic tanks to be used. It merely indicated that they would be used. So on that phase of it, we determined from the County of San Diego what the requirements would have been, and based the determination upon that.

Q. Have you determined, Mr. Burlake, based upon the investigation to which you have previously referred, what the estimated cost of land leveling, lawns, grading curbs, and landscaping to these buildings would have been in the year 1946?

Mr. Abbott: Your Honor, we have the additional objection that there is no evidence of any kind relative to those [1216] improvements described in the last question. Not even the charts that the witness made in late 1953 contain that data.

Mr. Cranston: If the court please, possibly further questioning of the witness prior to the ruling by the court might be of assistance.

Q. (By Mr. Cranston): Mr. Burlake, what is the custom followed in appraising to determine the reconstruction cost of buildings, with reference to curbs, landscaping, grading, and similar matters?

Mr. Abbott: Objection. It is immaterial and irrelevant, your Honor.

(Testimony of John Michael Burlake.)

The Court: I don't recall any evidence at all to this time that would furnish a predicate for that, as an item of damage.

Mr. Cranston: Your Honor, the question is directed to the fact that in the construction of buildings, one item to allow normally is for landscaping. That is, when buildings are prepared, one of the incidents is the landscaping surrounding the building. If this witness can testify such is the fact, and that the same practice was followed here, it seems to me that is material, and is included within the plans, in the same manner in which it is normal to put lath or plaster on a wall.

Mr. Abbott: Your Honor, I don't think the analogy is quite apt. What landscaping? Is it to be a small public park, [1217] or a small plot of 10 feet of grass? We have no way of knowing.

Mr. Cranston: The witness can testify to the area of landscaping, the amount that was considered, and the manner in which he arrived at his figures.

The Court: Yes, I know, but that does not furnish the court with the information, even under the theory of that concept, because there is no evidence, as I recall, by Mr. Sutro, or anybody else, that details the specific type of landscaping or improving of property around these houses. I don't recall anything in the record that warrants that, and we can not permit an appraiser to simply say that it is the custom. What custom? We are particularly concerned with a specific project, not with any generalized or suppositious situation.

(Testimony of John Michael Burlake.)

Mr. Cranston: Your Honor, it appears to me that a garden or a lawn is a natural and almost necessary accessory to a building, which is of any size, of any dignity, particularly where it is located in a large area.

The Court: Yes, but we are talking about a farming appurtenant. We are not talking about a residential section, or a palatial home in a farming community, because there is no evidence to support that, excepting that the plans, the specifications and the evidence are here as to what was in Mr. Sutro's mind, and as to what is delineated upon the physical objects that are in evidence. But to permit an appraiser, [1218] when he isn't a party to the action at all, he is simply here as an expert, to say, "Well, the average farmer would build a beautiful landscaped lawn, surrounded by ornamental trees," when we know from common knowledge that that is not the case generally, and it depends entirely upon the individual, is not material. I think we are getting into a realm of speculation and conjecture as far as money damages are concerned. The objection will be sustained.

I wanted to clarify an item in the index. There is an indexing here of miscellaneous improvements. Is there in that classification the matters that counsel has adverted to?

Mr. Cranston: Yes, those are the matters, your Honor, as to which I was referring.

The Court: I don't think we can, with any se-

(Testimony of John Michael Burlake.)

curity, in view of the record that is made here in this case so far, permit the witness to state anything concerning that matter.

Mr. Cranston: Very well.

Q. (By Mr. Cranston): Mr. Burlake, have you formed an opinion as to the cost of reproducing in 1946 the domestic water supply system which is delineated on the plans that you inspected, and what is that cost? A. I have.

Mr. Abbott: Pardon. We have an objection to that. It is not clear to government counsel as to whether the question is directed to plans in evidence. [1219]

Mr. Cranston: The plans in evidence which were submitted to the witness.

Mr. Abbott: Thank you.

The Witness: The answer is: I have.

Q. (By Mr. Cranston): What is that cost?

A. This cost, as of 1946, and I probably should state that it includes certain drains as well as water supply lines, is found to be the sum of \$3,997 for the piping and water tank associated with the system.

Q. And what would the cost for the same items be in 1952, as of July 21st?

A. In 1952, the sum of \$6,737.

Q. I note in the report that you have prepared dealing with irrigation works, on page 27 and on page 27-A, there are certain items starred with an asterisk. What does the asterisk indicate on those pages?

(Testimony of John Michael Burlake.)

A. The asterisk indicates that those starred items are tabulated in the column of 1946 appraised costs, but represent costs that would have been incurred in these exceptions in 1950, because the information at hand indicated that the plans for their installation were initiated in 1950, after certain water discoveries were made.

Q. Have you determined, then, the cost of the works referred to as irrigation works either in 1946, or, in the case of those items starred with asterisks, in 1950? [1220]

A. Yes, we have.

Q. And what is the cost?

A. The sum of \$38,726.

Q. Does that include an allowance for certain 8-inch steel pipe, which was to have been installed in 1946, but will not now be installed?

A. Yes, it does.

Q. And the amount of that allowance is how much?

A. The amount of that was \$621 as of 1946. There is no cost estimated at the later date.

Q. With the exception of that one item, what would the cost of reproduction in 1952 be of the items for irrigation works?

A. The sum of \$55,006.

Q. Based upon the material submitted to you, have you formed an opinion as to the cost of purchase or reproduction in 1946 of the items of shop machinery and equipment contained on the various lists submitted to you?

A. I have.

Q. And what is the total cost of those items?

(Testimony of John Michael Burlake.)

A. The total cost as of 1946, the sum of \$20,519.

Q. And have you computed the cost of the same items as of 1952? A. Yes, I have.

Q. What is the cost of those items in [1221] 1952? A. The sum of \$35,385.

Mr. Cranston: Your Honor, at this time I would offer in evidence the report, which has previously been marked for identification, excluding from the offer the summary production sheet, which is marked sheet 3, which compares cost of reproduction new in 1946 with cost of reproduction new in 1953, and excluding from the cost of reproduction sheet 3-A the line which is numbered 6—Miscellaneous Improvements; the line which is numbered 16—Farm Machinery and Equipment; the line which is numbered 18—Automobiles and Automobile Trucks, and excepting the totals which would have to be changed because of the elimination of the three items referred to, and also excepting from the offer page 23 and page 23-A, dealing with miscellaneous improvements, and pages 33, 34, 35 and 35-A, dealing with farm machinery and equipment, and pages 36 and 36-A, dealing with automobiles and trucks. With those exceptions I offer the report in its entirety in evidence.

Mr. Abbott: Your Honor, we appreciate the fact that expert witnesses, who have done a thorough job in investigating the matters which are the subject of the inquiry, need the report to assist them in testifying, but we know of no precedent for

(Testimony of John Michael Burlake.)

receiving the report in evidence, and will object to it as hearsay, and as irrelevant and immaterial.

Mr. Cranston: Your Honor, I can ask the witness every [1222] question that is contained in here, and put it all in the record, but I see no reason to do that.

The Court: I don't think so. I think the same rule is applicable that was well stated by the Court of Appeals some years ago in this Circuit in *United States v. Wells*. It is just simply a time-consuming matter in the courts, where an auditor, or an appraiser, or someone in those categories, is required to minutely and in detail take up the time, when it is all chronicled and epitomized and arranged clerically in a document.

Now, if there is any question about any of these at all, you can cross-examine on them, but to require the court to sit here and listen to a narrative of these items is simply out of the question.

Mr. Abbott: That was not the government's intention, your Honor. The witness had testified to his conclusions, and these things are simply the building blocks upon which those conclusions have been achieved.

The Court: You can cross-examine on them, if it is before you, if the document is here. That is the point. The point is to save time. That does not mean that by saving time the court adopts the statements that are the supporting elements to the conclusions that were given. That does not preclude you from cross-examining upon all of these items

(Testimony of John Michael Burlake.)

that are contained in these various pages that have been mentioned. [1223] But it is certainly in the interests of the economy of time, in which we are all interested, and, particularly, in view of the decision of the Ninth Circuit in that case. There may be others since that time, but I know of that one specifically. The objection will be overruled.

The Clerk: Mr. Cranston, is that Plaintiff's Exhibit 50 that you are referring to?

Mr. Cranston: I believe it is. The court has the original document, with the number on it.

The Clerk: That is No. 50 into evidence, with exceptions.

(The exhibit referred to was received in evidence and marked Plaintiff's Exhibit No. 50.)

Q. (By Mr. Cranston): Mr. Burlake, the figures which are contained in the portion of the report which has been introduced in evidence represent your opinion as to the items set forth in each case as to those specific figures—— A. They do.

Q. ——as to the cost in 1946 and in 1952?

A. They do.

The Court: Let me understand that a little more specifically, Mr. Burlake. Do these items that are contained in these pages merely contain your opinion as to the figures and amounts that are set forth therein?

The Witness: Well, your Honor, they contain—so far as [1224] we have gone, they contain my opinion, so far as an opinion may go, which is all

(Testimony of John Michael Burlake.)

the way to being the most precise type of an estimate permissible or available, based upon the data at hand.

I do not mean by that that they are merely an expressed opinion, but that they are the result of deliberations in the processing of all the available data and the exercise of the best judgment to obtain as precise as possible an estimate of something which has not yet transpired, and, therefore, cannot be recorded as an accounting fact.

The Court: For instance, let's take the item of domestic water system. Now, generally—I am not asking you specifically, because that is the very matter that the court has just discussed—in your opinion that you have expressed here as to the reproduction cost, do you limit that to physical factors, which include labor, or do you merge into it some deduction that you make yourself, regardless of the figures that are contained in these various pages?

The Witness: It is a little difficult for me to follow the question, but, if I understand it, the figures include consideration of the materials, the labor, the necessary overheads that would be involved in the reproduction or a production of the described property items, in the form in which they are described, as of the date that the opinion proposed to relate to, if those items were constructed under contract [1225] with a reputable contractor for that type of construction work.

(Testimony of John Michael Burlake.)

The Court: Those that you have enumerated are all physical factors.

The Witness: They are all physical factors. Overheads are physical factors. Profit is a physical factor, and is reflected in the property that is in existence. They do not include indirect costs of construction, such as taxes, or interest on moneys, or such things as that, but only those elements of cost that have gone into produce the property in question.

The Court: I see. Now, is there a question pending?

The Reporter: No, your Honor.

Mr. Cranston: You may cross-examine.

Cross-Examination

By Mr. Abbott:

Q. With respect to the farm-type structures which you appraised, did you make any study with respect to their economic feasibility?

A. No, we did not make a study of their economic feasibility, because we processed the data that was handed to us in the way of specifications. In other words, we appraised the intended structures without questioning, except in cases where it was obvious to casual inspection that there might be reasonable question, and that type of questioning was taken up [1226] with Mr. Sutro in conversation.

Q. Did you, in appraising any particular farming installation, form an opinion as to whether or

(Testimony of John Michael Burlake.)

not it was a reasonable installation for a profit-making enterprise?

A. Do you refer to this specific instance, or in other appraisals that I have made?

Q. This specific instance?

A. No, I did not.

Q. Did you form an opinion as to the useful life of each of the structures, the increased cost of construction of which you have appraised?

A. I might have, but it in nowise shows up in the results of my work, since they are of a specific moment.

Q. Calling your attention first to the six buildings, do they all have the same or substantially the same useful life?

A. I wouldn't necessarily say that they do have the same useful life, nor even that it would be substantially the same.

Q. Then starting with the implement shed, what is your estimate of its useful life?

A. I haven't specifically studied the implement shed, and I would not be able to answer at this time.

Q. Did you review the data prepared by your assistant with respect to the implement shed? [1227]

A. I did.

Q. And was that data sufficient to form an opinion as to its useful life? A. No, sir.

Q. Did that data include the building materials, and the type of construction, and the type of flooring?

(Testimony of John Michael Burlake.)

A. It did, but it did not include the conditions under which that life was to be expended.

Q. Assume a structure having the characteristics of the implement shed, as you appraised it, and further assume it will be used to store farm implements. With that additional assumption, can you express an opinion as to its useful life?

A. After some study, I would be able to do so, but not necessarily based upon those limitations either. The expression of an opinion on useful life requires a considerable study of diverse factors.

Q. What factors are not included in the question as propounded?

A. You haven't mentioned, for example, the type of tools. You haven't mentioned—you haven't considered, or given for me to consider, the type of weather that would prevail over the next 20 to 30, to 40 years.

Q. Do you ever, in forming an opinion as to useful life, know what the future weather is going to be, sir? [1228]

A. Insofar as the available records from the past would indicate it, and only so far do we know.

Q. With respect to each of the five other buildings, would your answers be the same to the questions I have last propounded relative to useful life?

A. Substantially, in that I would not venture an opinion without a detailed study.

Q. Now, with the exception of the residence, did you have actual plans on any of these six structures?

(Testimony of John Michael Burlake.)

A. Would you elucidate what you mean by plans, actual?

Q. Well, the drawings you have used are known in the profession as preliminary sketches, are they not, sir?

A. They might be. I would not go so far as to say that they are preliminary sketches, in that the plans, as I know them, went into considerable detail in outlining and specifying the sizes and locations of members of framing, which certainly is not in the nature of a preliminary sketch or plan.

Q. Do all of those plans contain sufficient data for a contractor to erect the buildings?

A. I would say that would depend upon the closeness of the supervision that the owner or his agent, such as an architect, would exercise over him.

Q. Did you obtain additional information not appearing on the drawings from Mr. Sutro?

A. There might have been some minor items. There were [1229] explanations. There were discussions of some things. Yes, I did obtain some additional information.

Q. He mentioned what materials he intended in certain places, did he not? A. He did.

Q. And what type of construction was contemplated where only a floor plan appeared in a particular drawing? A. Yes, he did.

Q. And he gave you the types of piping to be used in the irrigation system? A. Yes, he did.

Q. Did he give you specifications for the dam that was a part of the irrigation system?

(Testimony of John Michael Burlake.)

A. He gave me the calculated quantity of earth-work, and such data as had been developed for him by the Conservation engineers.

Q. Do you know the date that that information was prepared for Mr. Sutro? A. No, I don't.

Q. Were you presented with a Conservation engineer's report, or only Mr. Sutro's analysis or explanation of it?

A. I have seen data presented to me by Mr. Sutro, which purported to be reports and computations by Conservation engineers, but I don't know, to my own definite knowledge, that it necessarily was. I had to accept certain things as being [1230] what they purported to be.

Q. Well, did that document have a date on it?

A. I believe it did, but I don't recall what it was. My recollection is that it did.

Q. Do you recall whether or not it was approximately a current date?

A. No, I don't recall that it was a current date, if you mean within the last week or two, or month, or year.

Q. Within the last year.

A. As I recall it, it antedated the last year.

Q. Was it a date in the 1940s, or do you recall?

A. I think it was about 1940 something; late 1940s.

Q. Now, in preparing this analysis, did you consider building costs—or, correction—labor costs in the area in which the structures would be erected?

A. Yes, I did.

(Testimony of John Michael Burlake.)

Q. And did you assume that the labor was being employed on a straight-time basis?

A. I did.

Q. Did you investigate into the facts relative to labor availability in San Diego County in the year 1946?

A. At this particular time we did not, but we did have it over the years. We keep current with those factors, and they are on record in our office files.

Q. Did you consult those records in the preparation of [1231] this report?

A. Yes, I did, as a matter of normal checking procedures.

Q. And did those records show, that in order to secure labor in the year 1946 in San Diego County, a very substantial amount of overtime had to be provided for the employees?

A. No, they don't show that.

Q. Well, is that the fact?

A. I don't know that it is the fact.

Q. Are you personally——

A. I don't recall, in other words, that I have ever seen it as a matter of record attested to by an authority on it.

Q. Would you have a personal recollection of the labor supply situation in the year 1946 in Southern California?

A. Not a very clear one. At that time I was located in Northern California.

Q. Have you received information from any

(Testimony of John Michael Burlake.)

source to the effect that in the year 1946 throughout Southern California it was necessary to provide a substantial amount of overtime in order to secure labor?

A. I have talked to numerous people, and I have heard their say about it, but I cannot vouch for the facts, as to what they might be, because I have never personally myself employed labor in that form.

Q. Yes, I understand, sir. Were those numerous people [1232] employed in the building industry?

A. Some of them were. Some of them weren't.

Q. Calling your attention for the moment to those who were employed in the building industry, did some of them tell you that in the year 1946 a substantial amount of overtime had to be provided in order to secure employees in the buildings trades?

A. I don't recall the precise matters that they may have conveyed to me.

Q. Well, was that general thought conveyed?

A. It might have been, but I cannot vouch for it, because I have made no precise records of these things, and they would be only hearsay, in my opinion, in any case.

Q. Well, you understand, sir, that as an expert witness, you are entitled to summarize hearsay evidence that comes to your attention, especially when it comes from people who have knowledge on the subject.

A. That is true.

Q. Now, my question is directed to the hearsay

(Testimony of John Michael Burlake.)

information you received from people in the building trades. You have already testified you had no personal knowledge. I am asking you what you heard.

A. And I have told you why I can't quote what I have already heard. I can give you general impressions of what my recollection may be, however, and I will go as far as you like, [1233] but they will not pertain to this report, because it is qualified otherwise, if you have read it.

Q. To which qualification do you refer?

A. I refer to the qualification that we have not considered overtime, or premiums, or bonuses for labor, those matters which are difficult to ascertain and prove.

Q. Well, your testimony has been to the same effect?

A. That's right.

Q. I think that is understood. But we are now testing the assumptions upon which the report is based.

A. Naturally, under the circumstances, I have not given a great deal of time to a study of the facet that I have not intended to use in my particular preparation.

Q. We understand that you did not so assume in preparing the report. But this question is: What is the general impression that you have gained from talking with people in the industry relative to the necessity for paying overtime in order to secure labor in the building trades in the year 1946?

A. I would say that I have heard that it is a custom and a practical necessity that still exists

(Testimony of John Michael Burlake.)

today, and existed at that time, but as to the comparable degree, I am not competent to state an opinion.

Q. Your sources within the industry did indicate that it was a practical necessity in the year 1946?

A. Just as in certain trades it is today a practical [1234] necessity, that a good man will demand and receive a wage higher, but I cannot tell you how much higher, because I don't know.

Q. Well, isn't it a fact that today in the building trades overtime employment is at a minimum?

Mr. Cranston: If the court please, I will object to considering conditions today. We are limited by the court's ruling.

Mr. Abbott: The objection is well taken. I will amend my question.

Q. (By Mr. Abbott): Isn't it a fact that in July of 1952, overtime employment within the building trades was at a minimum by comparison with conditions over the 10 years preceding that date?

A. I won't hold myself qualified to answer that question yes or no. There have been periods in that interim when construction was at a reasonably low ebb, and whether it was lower than now and whether the conditions were worse or better than they are in 1952 or in 1953, I am not qualified to say.

Q. Well, in all respects, sir, your qualifications are so excellent that I would assume that this would be a factor which would come to your attention.

(Testimony of John Michael Burlake.)

A. I agree that it is a factor which comes to my attention, but I am trying to say that I cannot pin it down as being a fact, or even a close fact, a semblance to a fact. [1235]

Q. Did you interview any contractors in the Oceanside or northern San Diego County area to ascertain whether or not, in their opinion, there was a measurable, or at least an approximately predictable increment in building costs in 1946, attributable to the necessity for employing overtime labor?

A. No, I did not.

Q. Can you tell me, sir, where I can find in the exhibits which were made available to you in connection with your study, the plans of the domestic water supply system?

A. Where you may find that in the exhibits? I don't know the name of the exhibit, but there is one plan showing an outline of what I referred to as the domestic water supply system, including the orchard irrigation system and necessary drain lines in connection therewith.

Mr. Cranston: Is this the document to which you refer?

(Handing document to witness.)

The Witness: This is it.

The Court: What is that?

Mr. Abbott: The witness is now viewing Plaintiff's Exhibit 44-N.

Q. (By Mr. Abbott): On page 24 of your report various items appear. One is a 10,000 gallon

(Testimony of John Michael Burlake.)

capacity wood stave open top elevated water tank. Would you point that out on the chart to me?

A. It is indicated to be there [1236] (indicating).

Mr. Abbott: The witness has now pointed to a circle close to the right-hand edge of the chart with the number and symbol "90" and a degree within.

Q. (By Mr. Abbott): Will you please explain to me how you ascertained that that was a 10,000-gallon capacity wood stave open top elevated water tank, two-inch staves and bottom, 3-inch by 10-inch chine joists, etc., as appears in the first item on page 24?

A. That was based upon questioning Mr. Sutro as to the size of the tank, and observation of the tank when I was on the premises.

Q. Is that tank presently in place?

A. To the best of my knowledge, it is. I haven't been on the premises since November 9th.

Q. Did you ascertain when it had been purchased?

A. No, I did not.

Q. This report contains considerable detail with respect to the irrigation system, which, so far as I have been able to ascertain, does not appear on the chart of that system in the record. Will you explain where that detail was secured?

A. I would be glad to, if you will mention any specific item. Otherwise, I would probably ramble on at great length.

Q. Well, just in general, are these detailed specifications for the irrigation works, commencing at

(Testimony of John Michael Burlake.)

page 25 of the [1237] report, specifications secured by interview with Mr. Sutro and not from the charts in evidence?

A. I believe they were generally, as my recollection is, they were generally obtained from the charts that are in evidence on record, and from an understanding of what symbols appearing on the chart might mean; very limited questioning of Mr. Sutro on such matters as piping, because it is quite evident, but also upon a communication of Mr. Sutro's more extended specifications, which I have in letter form.

Q. Mr. Sutro sent you a letter with the specifications?

A. He did, because we put those things on record, to save me a lot of trouble in copying the results.

Q. And that letter contained a lot of data that does not appear in the plans, did it not?

A. It contains a lot of explanatory data, and supplementary data in some degree, and repeats material that was on the plans. For example, my recollection is amounts of excavations for a reservoir appear on certain plans in evidence, to my knowledge, but they are also repeated in the letter.

Q. But there are numerous other items in the letter which do not appear on the plans, are there not?

A. Not necessarily numerous. There are numerous items that do not appear in the letter that are on the plans. We used the sum total of the data

(Testimony of John Michael Burlake.)

that we had, one complementing the other. [1238]

Q. Yes, sir. Now, on page 27 of your report, under the head, "Irrigation Works," the second item is 3,425 linear feet of 8-inch diameter 10 gauge steel pipe, which in 1952 you appraised as having a cost of—I don't find a 1952 appraisal. I find a 1953 appraisal of \$9,590. But this question is not directed to the figure. Will you tell where you got the specifications for 10 gauge steel pipe?

A. From Mr. Sutro.

Q. On page 32-B of your report, under the head, "Shop Machinery and Equipment," I find the item 5 buried tanks, 1952, cost \$3,150. Where on the charts in evidence do those 5 buried tanks appear?

A. It is my recollection that they appear on—I am looking at five of them right here, on this particular chart we were just examining.

Q. What type of tanks are those?

A. Buried steel tanks.

Q. For what purpose?

A. For purposes of Diesel oil, fuel oil, and gasoline.

Q. I am pointing now to three of the tanks. These are the other two up in the left-hand corner?

A. That is right.

Mr. Abbott: I have no further questions at this time, your Honor. [1239]

(Testimony of John Michael Burlake.)

Redirect Examination

By Mr. Cranston:

Q. Mr. Burlake, you were asked whether you had formed an opinion as to whether any of the buildings, or the total of the buildings and the equipment you testified to were from an economic basis. Are you familiar with repair shops on farms which have equipment similar to that referred to in the list of equipment contained in this inventory?

A. Relatively so; familiar with it by association in other appraisals I have made of other ranch properties.

Q. Have you found other ranch enterprises in which equipment of this type was used?

A. Yes, I have.

Q. Would you say that equipment of this type is used in farming operations in California?

A. It is not necessarily used, I would say, on all farms of either this particular type or this particular size, but some, if not all, forms of equipment herein listed and inventoried and valued will be found on ranches and farms, depending upon the amount of repair work that they must do, and the circumstances under which available repair facilities are located.

Q. You have not considered the nature or relative amount of equipment in any of these cases?

A. No, I have not, beyond the point that I note there [1240] are few duplications, and the minimum

(Testimony of John Michael Burlake.)

amount of any piece of equipment to do a specific job would be one.

Q. Now, you referred to certain information which Mr. Sutro gave you, which purported to come from the Soil Conservation Service. I refer you to a document marked Plaintiff's Exhibit 40, and ask you if this is the document to which you referred?

A. This I recognize to be one of the documents that Mr. Sutro made available to me.

Q. And does that appear to be the date to which you referred?

A. Well, I see that date on it. That is the date that I recall having been on it, but as to when that date was put on, of course, I don't know. That is in ink, and the rest of it is in pencil. I wouldn't testify as to what the age of that document might be.

Q. But that is a document——

A. But that is the document, as I recall it, and the figures that I was trying to recall with as much precision as possible.

Mr. Cranston: If the court will pardon me, I am endeavoring to find one of the exhibits.

Q. (By Mr. Cranston): You were asked concerning a certain item of 8-inch steel pipe, which appears, I believe, on page 27 of your report. I will ask you if that pipe appears [1241] on Plaintiff's Exhibit 38?

A. It does, as a brown line or an orange colored line; I would say a brown line.

Q. You testified that on certain occasions you discussed various matters with Mr. Sutro in re-

(Testimony of John Michael Burlake.)

gard to the type of construction. Did you follow out Mr. Sutro's instructions in those matters, or did you ask him for information, and then proceed with your own appraisal?

A. It depended upon the particular circumstances. I recall one particular instance where, with regard to the implement shed, Mr. Sutro gave his intention as having been to construct a set of doors in the full wall on both sides of the building, when the drawings only definitely showed four sliding doors to be on one side, and regardless of the fact that the building was so framed that another set of doors could be located on the other side, and Mr. Sutro's evidencing an intention by word of mouth, we did not go along with him, and we stuck to the drawings in that case.

Q. Now, you were asked concerning a 10,000-gallon water tank which appears on one of the pages in your report, on page 24. Do I understand that you observed a tank in place on Mr. Sutro's property?

A. I did. There was a tank there on November 9th.

Q. And are the specifications set forth in here in accordance with the tank actually in [1242] existence?

A. They are, as substantially in accordance with the tank as existed, except it does not have a roof on it to this date, to my knowledge, whereas my specifications call for a roof. There is a case where Mr. Sutro's intention to put a roof on was con-

(Testimony of John Michael Burlake.)

sidered to be reasonable. A water supply tank should be covered.

Q. Do I understand it to be your opinion, Mr. Burlake, that the matter of overtime at any particular time is too indefinite to be considered in making an appraisal?

A. I would say that it is, unless a definitely planned study is made to ascertain conditions that normally are under cover, to a large extent, and very variable from one job to another, and can't be considered as normal.

Q. Does your office have in its possession labor records and wage scales for Southern California in general, and for San Diego County in particular?

A. Yes, we do.

Q. And these cover the period from 1946 through 1952, as well as other periods?

A. They do, as well as other periods.

Q. Those scales are obtained and derived by you from all reputable sources known to you?

A. They are from the most reputable sources we know.

Q. And in making this report, did you use the figures which are set forth in this [1243] information? A. Yes, we did.

Q. And that figure would make allowance for all items which were statistically proper to be included, is that correct, in your opinion?

Mr. Abbott: I will object to that as being far too general. If the question is: Does it include overtime, I have no objection to it.

(Testimony of John Michael Burlake.)

The Court: It seems to be quite a comprehensive question, Mr. Cranston.

Mr. Cranston: I will reframe the question.

Q. (By Mr. Cranston): In preparing your report, and in determining costs, did you take into consideration all factors which in your opinion could be gauged with any accuracy? A. We did.

Q. I believe you testified to certain work in connection with dams and reservoirs, and estimates made by you. Referring again to Plaintiff's Exhibit 38, did you find information on this exhibit which was of assistance to you in that connection?

A. With regard to dams and reservoirs, yes, there was some information that was available from these plans, but, generally, it was expanded by other drawings available on reservoirs. This might be outlining of a reservoir on this plan. There were more detailed drawings available.

Q. Those I believe are these two documents, Exhibits [1244] 48 and 48-A; is that correct?

A. 48 and 48-A; yes.

Mr. Cranston: That is all.

Recross-Examination

By Mr. Abbott:

Q. You testified to having some familiarity with equipment used on other ranches in the general area of the Sutro ranch. Will you name three ranches within a 50-mile radius of that ranch which have 17 pieces of electric-powered equipment and one piece of gas-powered equipment on them?

(Testimony of John Michael Burlake.)

A. May I ask to have my reply to your inferred question read to me?

Mr. Cranston: I do not believe the witness testified to how Mr. Abbott has stated.

The Witness: I do not recall testifying to knowing any given ranch in Mr. Sutro's area other than his own.

Q. (By Mr. Abbott): You have testified to a general familiarity with farm equipment, have you not? A. That is right.

Q. Have you acquired that familiarity from inspecting or visiting farms and ranches?

A. Yes; not from being a rancher.

Q. Yes. Now, from those inspections and visits, can you recall one ranch within a 50-mile radius of the Sutro ranch which has 17 pieces of electric-powered shop equipment [1245] and one piece of gasoline-powered shop equipment?

A. I can't recall one ranch within a 50-mile radius.

Q. In what area——

A. Why do you limit it to a 50-mile radius, when my experience isn't that small?

Q. I won't. In what area were these ranches and farms that you visited?

A. I think of one offhand in Arizona. I think of two in Arizona. I think of two in Northern California that had at least an equal amount. But, as you recall, I explained my opinion that the actual amount of equipment you would find on a given ranch would depend upon local circumstances, and

(Testimony of John Michael Burlake.)

somewhat the owner's anticipation of his needs and his wishes as to how to handle them.

Q. In other words, the owner's own personal wants is what you considered when you answered that question?

A. Partly. His wants, and his estimation of the best way to provide for them.

Q. Now, you have appraised ranch and farm type buildings in the Southern California area, have you not? A. Yes, I have.

Q. Have you on any ranch under 500 acres found a structure to house equipment consisting, in part, of 17 electric-powered operated devices and one gas-powered operating device?

A. I don't recall any. [1246]

Q. Do you know of any ranch in the Southern California area under 500 acres which has a crane?

A. It would partly depend upon the definition of a crane. If you speak of a crane substantially the duplicate of the crane that Mr. Sutro's ranch is proposed to be equipped with, I would say no, but there are many modifications of the form of crane, and——

Q. Do you know of any ranch in the Southern California area with less than 150 irrigable acres, or tillable acres—that should be just tillable acres—which have 7,000 or more square feet of area under roof and floored for agricultural buildings?

A. It would be difficult for me to say.

Q. Do you know of any ranches twice that size which have such facilities?

(Testimony of John Michael Burlake.)

A. Located in Southern California, or Northern California, or where?

Q. Yes, in Southern California.

A. No, I don't, but in Northern California I do.

Q. Now, isn't it true, sir, that the Bureau of Labor Statistics of the United States Department of Labor publishes a detailed report of labor earnings every week, and that that report contains in part an analysis of overtime earnings?

A. I don't know that.

Q. Well, isn't it true that such a report is available, [1247] and further contains that data broken down on an area and locality basis?

A. I don't know that.

Q. Do the labor costs indices in your office consist wholly of straight-time labor costs?

A. The labor cost indices in our office, so far as I know, do consist wholly of straight time. That is the form in which we publish any indices that we do publish.

Q. So that the data or records to which you alluded in answer to Mr. Cranston's questions are data and records relating to straight time labor rates, are they not?

A. Now, you are speaking of data rather than indices, and we are speaking of something which is on record, and which we know about—the overtime rates that do prevail. So that I would say in my answer that I was alluding to and was cognizant of overtime rates, in my answer to Mr. Cranston's

(Testimony of John Michael Burlake.)

question, as I remember it, although, insofar as we did not contemplate any specific, other than the normal overtime that certain trades must perform in the normal erection of an improvement, simply because they must follow upon other trades which, if they quit at 5:00 o'clock, someone must work until 5:30 or maybe 6:00. Other than that, we have not considered the overtime rates to be applicable in compiling our report.

Q. Do contractors in the Southern California area, in bidding for construction work, predicate their bids in part [1248] upon the necessity or absence of necessity for employing labor on an overtime basis?

A. I would say that would depend entirely upon the particular conditions, as well as the general conditions.

Q. Well, in the year 1946 were contractors following that practice? A. I don't know.

Q. Did you make any effort to ascertain the factors upon which contractors based their bids in the year 1946?

A. With reference to this particular job?

Q. With reference to this particular investigation.

A. Or investigation. I did not make a specific investigation in that direction, beyond what I already knew would be the practice at that time. I tried to have a home built at that time. I knew what the practice was in that respect.

Q. You knew what the practice was in 1946 with

(Testimony of John Michael Burlake.)

respect to the inclusion of an element for overtime compensation in bids?

A. I would say not. I knew of the practice that would exist, that the work would be done on a materials plus cost and overheads basis; cost of materials, labor, and overhead basis, generally.

Q. A so-called cost-plus method?

A. Or estimate. It was admittedly difficult, if not impossible, to get a flat bid at that time. [1249]

Q. And that was because of the difficulties in securing labor on a straight-time basis, in part, was it not?

A. That I don't know about. I don't know why it was, but it was, as I found out.

Q. But, in any event, you didn't find it necessary in order to fix and achieve the opinion which you have expressed here to inquire into the factors which motivated contractors in preparing their bids in San Diego County in the year 1946?

A. Not beyond the knowledge I already had.

Q. And the knowledge you already had is the knowledge you have just stated in answer to the preceding question?

A. As to the general—yes, as to the general situation.

Mr. Abbott: No further questions.

(Testimony of John Michael Burlake.)

Redirect Examination

By Mr. Cranston:

Q. Mr. Burlake, do your records show on any particular item the total percentage of that item attributable to labor, that is, do your records, say, with regard to the buildings show the breakdown between labor and materials, or are they broken down on some other basis?

A. They don't show the breakdown in total. They do indicate the proportionate parts of the unit costs, which are labor and which are material in most cases, however, insofar as it applies to a particular element of construction. [1250]

Q. And that labor cost on any particular unit would, of course, vary widely depending on what the unit is? A. Yes, it would.

Q. Is it possible for you to give any general estimate, then, as to the portion of any one of your figures which would represent the labor cost computed by you, and what cost would represent material or other items?

A. May I have that question again?

(Question read.)

A. That is a little too involved to answer directly, because you referred to both general and specific by "any one." If you could restate the question, I believe I could do better.

Q. I will rephrase the question: Take, for example, a specific building such as the implement

(Testimony of John Michael Burlake.)

shed. Would your figures show the amount involved in labor in that building, and the amount of the total price which would represent costs other than labor?

A. Not directly. It would have to be done as a matter of analysis, to draw the figure.

Mr. Cranston: That is all.

Mr. Abbott: I have nothing further, your Honor.

The Court: That is all.

(Witness excused.) [1251]

Mr. Cranston: If the court please, at this time I would like to submit to the court a very brief second supplemental complaint, to bring our allegations as to damages down to the date of this hearing. There was some contention made at one of the previous hearings that a complaint could go only to the date as of which it was filed. Inasmuch as we have regarded this as a continuing trespass here, we are asking leave to file this amended complaint, which consists of just two paragraphs.

Mr. Abbott: May we have an opportunity to read it prior to the court's ruling?

The Court: Yes.

Mr. Abbott: Is this \$150,000 prayer in addition to the \$650,000 odd total in the pleadings filed to date?

Mr. Cranston: Mr. Abbott, the total in the previous complaints I do not believe total \$650,000, unless you would include the accruing damages.

Now this, I take it, would include, or would be included within the accruing damages, although I

don't know that it makes any particular difference whether we add it on or whether they run consecutively or concurrently, so to speak. The court will award whatever damages it sees fit, regardless of the prayer.

Mr. Abbott: This would be in lieu of the \$375—is it \$275 or \$375 per diem rate, or in addition to it? [1252]

Mr. Cranston: No, this would be in lieu of it.

The Court: Is there any objection to it, gentlemen?

Mr. Abbott: No objection to it, your Honor.

The Court: It will be filed.

Mr. Cranston: If the court please, for the purpose of the record, I would like to offer at this time to prove by the witness who has just been on the stand the 1953 costs for the various items as set forth in his report, the portions of the report which have not actually been introduced in evidence, but which were identified, and for the same purpose I would offer in evidence the documents, Exhibits 44-O, 46-A, and 47, consisting of the list of farm tools, the list of the pumping equipment, and the fencing map, which were identified by Mr. Sutro yesterday, but which were not admitted in evidence at that time.

The Court: I think the rulings will stand. That means that the offer will not be received.

Mr. Abbott: So that the record may show, the government renews the objections previously tendered to that offer.

The Court: And they are sustained.

Mr. Cranston: I would also at this time offer in evidence the additional lines and the portions of Plaintiff's Exhibit 50, which were excluded from the previous offer, that is, the lines in which the opinions of Mr. Burlake as to farm machinery, miscellaneous improvements, and automobiles [1253] and trucks are set forth.

Mr. Abbott: We object to the offer of proof on the ground that it is irrelevant and immaterial, and does not fix any proper item of damage awardable under the Tort Claims Act.

The Court: Objection sustained.

Mr. Cranston: The plaintiff will rest, your Honor.

The Court: You have your witnesses here, have you, Mr. Abbott, to go forward now?

Mr. Abbott: Yes, your Honor, we have. We are prepared to go forward.

The Court: We will take a recess for about five or ten minutes.

(A short recess.)

Mr. Weymann: Mr. Goode, will you come forward?

STANLEY E. GOODE, JR.

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: Stanley E. Goode, Jr.,

Mr. Cranston: Mr. Weymann, may I interrupt just a moment?

Mr. Weymann: Yes. [1254]

Mr. Cranston: Your Honor, I notice that in my offer in evidence of portions of Exhibit 50, I inadvertently included in the part which was offered and accepted the line No. 12 of the summary, irrigation pumps. I presume that in view of your Honor's rulings, that line should also have been excluded from the offer in evidence.

The Court: It will be so ordered.

Direct Examination

By Mr. Weymann:

Q. Mr. Goode, where do you reside?

A. In Santa Ana.

Q. How long have you resided there?

A. I have lived there all my life. I was born in Santa Ana.

Q. What is your occupation?

A. I am a real estate appraiser.

Q. How long have you been engaged in that profession? A. Since 1940.

Q. Since 1940. Are you a member of the firm of Goode & Goode— A. Yes, sir.

Q. —Real Estate Appraisers?

(Testimony of Stanley E. Goode, Jr.)

A. Yes, sir, I am.

Q. And how long has that firm been established?

A. Well, I am in partnership with my father, who has been an appraiser in Orange County for, I will say, approximately 40 years, and it has been a partnership since 1940. [1255]

Q. Do you hold a membership in any professional organizations? A. Yes, I do.

Q. What are those organizations?

A. I am a member of the American Institute of Real Estate Appraisers, a member of the American Right-of-Way Association, the Institute of Farm Brokers. I am a member of the Santa Ana Board of Realtors, and thereby hold membership in the California Real Estate Association and National Association of Real Estate Boards.

Q. You have mentioned the American Institute of Real Estate Appraisers. What is that organization?

A. It is an organization of professional men, whose entire time is devoted to the appraising of real estate, and the purpose of it is to limit membership to men with qualifications, who pass examinations and who meet standards set up by this group itself.

Q. Does that organization have a code of professional ethics? A. Yes, it does.

Q. What experience have you had in connection with your association with that organization in the form of lecturing or speaking?

A. I lectured in 1950 at the Southwest Regional

(Testimony of Stanley E. Goode, Jr.)

Conference of the American Institute of Appraisers here in Los [1256] Angeles, and at the same time was a member of a panel of speakers during sessions where questions were asked. That is an educational type of meeting.

I performed the same function in 1951 or '52 in Houston, Texas, at the South Central Regional Educational Meeting of the American Institute.

I lectured for key study courses 1 and 2, given by the American Institute of Appraisers at the University of California at Davis during 1953, a course put on by the American Institute of Appraisers in conjunction with the staff of the University of California at Davis, and in conjunction with the professors there at Davis. [1257]

Q. And is Davis the branch where the Agricultural Experimental Station is located?

A. Yes, it is.

Q. I don't believe you gave us your educational background. Will you give us that, Mr. Goode?

A. I attended schools through high school in Santa Ana. I attended Stanford University for four years. I attended school, that is, night school, at the University of Southern California, studying appraisal, during 1940 and '41.

Q. What did you major in at Stanford?

A. My major was economics.

Q. Have you been employed by any governmental agencies to make appraisals?

A. Yes, I have. I have been employed by the War Department, the Army, and by the United

(Testimony of Stanley E. Goode, Jr.)

States Navy, by the State of California Division of Highways, and the United States Bureau of Reclamation, the Veterans Administration, the Alien Property Custodian's office, the Department of Finance of the State of California, the Veterans Welfare Board of the State, of the 32nd Agricultural District of the state.

Q. Have you finished? A. Yes.

Q. Now, with reference to your employment in connection with these governmental agencies, have you represented [1258] property owners in any litigation with any of these governmental agencies?

A. Yes, I have.

Q. Would you say that your representation of the landowners or the representation of the governmental agencies was the predominant employment?

A. I would say that I represented more property owners numerically and volumewise than I do government agencies.

Q. Have you ever been appointed as appraiser or referee in any courts of the state of California or the Federal courts?

A. Not in the Federal courts. I have in the Superior Courts a number of times.

Q. Will you state, please, some of the private corporations or other clients by whom you have been employed as an appraiser?

A. I was a staff appraiser, and still partially hold that position with the First National Bank in Santa Ana, and have appraised for the other local banks there, the Commercial Bank, and some of the

(Testimony of Stanley E. Goode, Jr.)

other lending institutions, the Orange County Teachers' Credit Union and the Commercial National Bank, on more or less a perennial basis whereby I am working for them on a number of assignments during the years. I have appraised for the Citizens National Bank in Riverside. I have appraised—was staff appraiser for the First [1259] National Bank in connection with the Santa Ana Mortgage and Investment Company properties.

Q. By the way, that Santa Ana Mortgage and Investment Company, I believe there has been testimony here that they owned the subject property at one time?

A. That is correct.

Q. Proceed, then, Mr. Goode.

A. Other organizations that I have worked for are the First Trust & Savings Bank of Pasadena; the West Coast Life Insurance Company; the Ford Estate of New York; the National Guaranty Life Insurance Company; the MacMillan Petroleum Company; the First National Bank of Beverly Hills; the Irvine Company of West Virginia, and that is an Orange County organization.

Q. Is the Irvine Company of West Virginia the fee owner of the Irvine property in Orange County?

A. Yes, sir; that is correct.

Q. Which comprises how many acres, about?

A. Approximately 93,000 acres at the present time. The Irvine Foundation and the Irvine Company have an ownership combined on that ranch.

Q. All right. Any others that you wish to men-

(Testimony of Stanley E. Goode, Jr.)

tion?

A. The Connecticut Mutual Life Insurance Company; the General Petroleum Company; the Rexall Drug Company; Southern Counties Gas Company; Southern California Edison Company; [1260] Union Oil Company; Orange County Title Company; Abstract and Title Guaranty Company; Title Insurance and Trust Company; Pacific Electric Railroad; Holley Sugar; Famous Department Stores; the Crocker Bank in San Francisco; Pomona College, that, is for the board of trustees of Pomona College; the board of trustees of the University of California; the Dominguez Estate, and the Carson Estates Company.

Q. What properties did you appraise for the Dominguez Estates Company?

A. Properties they owned in the San Clemente district of Orange County, right adjacent to the north boundary of Camp Pendleton.

Q. Did you ever appraise property where the buyer and the seller agreed in advance to consummate sales based upon your opinion of value?

A. Yes, sir, I have.

Q. In what instance did you do that?

A. I am currently making an estimate of the fair market value on approximately 300 acres of land on the Irvine Ranch for that purpose, wherein the board of trustees of the University of California and the Irvine Foundation and the management of the Irvine Ranch Company have agreed in advance to transfer the property, buy and sell, respectively.

(Testimony of Stanley E. Goode, Jr.)

at whatever the estimate is, and I am receiving my instructions jointly from both parties. [1261]

Q. And have you appraised agricultural property for the purpose of estimating its rental value?

A. Yes, I have.

Q. Will you state, briefly, some of the properties that you have appraised?

A. This last year, that is, during 1953 and a portion of late '52, I appraised the entire holdings of the Fred Bixby ownership in connection with his estate, and it involved approximately 25,000 acres of land. And the problem involved was one of computing the fair market value of shares of stock, ultimately, and in that connection it was necessary to not only estimate the fair market value of the property, but also the rental value of the property, so that each parcel that was appraised was appraised with that dual purpose in mind.

Q. Did that appraisal include the appraisal of the buildings and the improvements on that property?

A. Yes, sir, it did; everything, excluding personal property.

Q. Have you appraised any properties that are near the subject property, which, to your mind, are comparable or would furnish a basis for an opinion to be given in this case?

A. The nearest property in that district which I have appraised was the Williams' ranch. It is located two or three [1262] miles from the Sutro property, in the San Luis Rey River Valley, di-

(Testimony of Stanley E. Goode, Jr.)

rectly east, I would say, of the Sutro ranch approximately three miles, and the Pankey ranch at Bonsall which I believe is about five miles, more or less, possibly a little longer distance, up the San Luis Rey Valley at the intersection of Highway 395 and Pala Road, consisting of 4,200 acres.

Q. By the way, what is the acreage of the Williams property?

A. I don't recall exactly, but it is approximately the same size as the subject property.

Q. Any other ranch properties?

A. In connection with the Pankey ownership, I also made—well, I have actually appraised the 4,200-acre ranch twice, and was on the land in connection with the sale of that property at another date, when it was proposed for purchase by the State of California, and I appraised 300 acres of irrigated pasture land owned by one of the Pankey brothers in that same vicinity.

Q. And how near is that to the subject property?

A. That would be the same distance as the other ranch. In other words, it is property lying adjacent thereto.

Q. What other ranch properties did you appraise besides those mentioned?

A. Those are the nearest properties that I can recall offhand in the San Luis Rey Valley [1263] district.

I have appraised approximately 3,600 acres of land in San Diego County in connection with the

(Testimony of Stanley E. Goode, Jr.)

acquisition of Camp Lockett, appraised for the Government, but that is quite some distance from the subject property. It is at the opposite end of the county.

Q. Did you appraise any other ranches in Southern California? A. Yes, I have.

Q. Which ones did you appraise?

A. Well, I appraised the Harriet Heath properties, which involved 50,000 acres of land in Imperial Valley, San Bernardino and Riverside Counties, Orange and Los Angeles Counties, Kern County, Kings County and Fresno County.

The Susannah Bixby Bryant property, which consisted of 10,500 acres, more or less, located within Orange and Los Angeles Counties.

These are entirely agricultural lands that I am speaking of.

The James Irvine properties, that is, the properties that were in his estate, not the 93,000-acre ranch, but 1,100 acres which were in his estate, located in the Lakewood district, which at that time was classed as agricultural or land in a transition stage, but today would definitely be in the middle of the city.

I mentioned the Fred Bixby properties. [1264]

Q. By the way, on the Fred Bixby properties, were those properties owner-operated, or were they tenant-farmed?

A. The lands in Los Angeles and Orange Counties were entirely tenant-operated, truck crop land, land that was used for the production of alfalfa,

(Testimony of Stanley E. Goode, Jr.)

lima beans, black-eyed beans, various types of truck crops, while some of the lands in Santa Barbara County were cattle ranches, and those were owner-operated.

Q. Any other ranches of farm and grazing land that you have appraised?

A. I have appraised the Moulton ranch in Orange County, lying along the coast immediately south of the El Toro Marine Base, running down to the coastline at South Laguna. I have appraised that twice. Once in connection with the arbitration over the division of the ranch between the Moulton and the Deguerre interests, and subsequently for the Moultons on their two-thirds of the ranch, which was eventually partitioned, and I served as appraiser for the arbitrator, who was Mr. Hub Russell, on that particular arbitration, who was the Moulton's representative in that arbitration, but that land is pasture land. It is predominantly a cattle ranch, with dry farm grain, hay, oats, dry farm beans, and some irrigated crops.

Q. Was that in connection with the El Toro Marine Base? [1265]

A. No, I did appraise the land which was taken for the El Toro Marine Base for the Irvine Company, but that was another assignment.

Q. Oh, I see.

A. That involved approximately 4,000 acres of land initially, but I can't state exactly what the total is now, because there have been three subsequent acquisitions for housing, and for extension

(Testimony of Stanley E. Goode, Jr.)

of air fields, and in each instance I have appraised the property for the Irvine Company in connection with those extensions.

Q. The 4,000 acres included farm and grazing land?

A. That land was entirely farm land, that is, it was predominantly irrigated bean land and vegetable truck land, with the exception of the Nemour Housing and the recent extension for the fuel dump, which involved a small amount of grazing land, 300 or 400 acres, approximately.

Q. How long ago did you make that appraisal?

A. Well, there is one I am still working on.

Q. I see. In the course of your investigation for the purposes of that appraisal, did you ascertain the source of the water supply for the 4,000 acres?

A. Yes, I did.

Q. What was that?

A. The water supply for that land is from wells, and from a gravity supply which is brought to that district by [1266] the facilities of the Santiago Dam, and a canal that runs in a southeasterly direction from the Santiago Reservoir to this point.

Q. Did you appraise any other ranch property that you haven't mentioned?

A. I appraised the McNally ranch, which was 2,200 acres of land in Los Angeles County, in 1951, I believe. It was land that was actually in agricultural use, vegetable truck crops, some dry farm land, some orchards, lemons, citrus, and so forth;

(Testimony of Stanley E. Goode, Jr.)

land that is since being devoted to subdivision use, at least, portions of it.

I appraised the Orange County Airport at the time it was originally acquired as a military installation from the Irvine Company, and represented the Irvine Company in that connection.

And the State Mental Hospital site in Costa Mesa, involving 750 acres of land.

I represented the Department of Finance of the State of California on that assignment. It included dry farm lands, irrigated and pre-irrigated lands, including truck crops, chili peppers and that sort.

I appraised the Wagon Wheel ranch, which was a 5,500-acre ranch, owned by Mr. Nohl in the Santa Ana Canyon district of Orange County.

Q. And what was raised on that? [1267]

A. That is a cattle ranch.

Q. A cattle ranch. Are there any other appraisals that you made, which included truck farming, for edible vegetables, and beans, and other similar crops?

A. Yes, sir. I appraised the Santa Ana Army Air Base for the Corps of Engineers, which involved 1,800 acres of land between the city of Santa Ana and the city of Newport, now the site of the Fair Grounds, which at that time was predominantly devoted to the production of lima beans. There were some truck crops grown on the property at that time and in that connection I made an appraisal of the railroad right-of-way from the existing facilities in Santa Ana to the Army Air Base.

(Testimony of Stanley E. Goode, Jr.)

which ran through the Greenville farming area, southwest of Santa Ana, including all types of irrigated crop land, lima bean land, and so forth, in that district.

The Santa Ana Naval Air Station was another. That is the property commonly referred to as the Blimp Base, or presently the Marine Corps Helicopter Base, located southeast of Santa Ana, and in which case the lands included were sugarbeet, alfalfa, lima bean land, general field crops, with some orchard crops involved, too.

Q. Now, in these appraisals that you made, Mr. Goode, you appraised the land with the improvements thereon? A. Yes.

Q. And you necessarily noted the buildings and the [1268] equipment thereon, did you?

A. In great detail as to the buildings. And considerably less detail as to the equipment. In the case of the type of assignment which I have been mentioning. the equipment, generally speaking, hasn't been a part of our function as appraisers, but in some cases it is our function.

Q. Well, when I speak of equipment, I mean such equipment as is affixed to the realty—

A. Oh, yes.

Q. —rather than to others? A. Yes.

Q. And in all instances, of course, that was included in your application to appraise values?

A. Yes, sir.

Q. Now, were you asked to form an estimate of the loss of the rental value on the Sutro property,

(Testimony of Stanley E. Goode, Jr.)

occurring during the period from 1946 to 1952, inclusive? A. Yes, sir.

Q. Will you state, generally, what steps you took to form an opinion of the value of the property, the market value and the rental value of that property in 1946?

A. I obtained a map of the property, showing its perimeter, the location, and USGS topo maps of the district surrounding the property, and obtained several aerial photographs of the property, and included with this, soil map and [1269] the legal description of the land.

I visited the property, and made my initial inspection of it, and interviewed the owner.

I examined the transcript of the case for the purpose of obtaining what factual information had been previously reported to the Court.

I contacted the San Diego County Assessor's office, and obtained certain data from them, including the tax factor map, showing the soils as their office plots them, and I obtained a copy of the Soil Conservation report.

I went to the Land Title Company in San Diego, after having made a general tour of the district, and employed them to run a chain of title, and furnish a chain of title to me on properties running up the San Luis Rey River valley from the intersection with 395 down to the approximate city limits of Oceanside.

In that connection I obtained actually an abstract record of each recorded instrument that took place

(Testimony of Stanley E. Goode, Jr.)

within the past 10 years on any of the sections of land, any land lying within those sections that I designated, and it happened to be about 16 square miles of land, as I recall.

From those chains of title, I selected the deeds that I cared to inspect, and further employed the Title Company to furnish me with a photostatic copy of such deeds, for the purpose of further processing them and making comparisons of [1270] the selling prices on other lands during that period of time with the subject property.

Q. And did that include, of course, a record of any recorded leases of any other properties?

A. It would but it was quite interesting to note that there wasn't a single lease recorded on any of the 16 sections in that area in the last 10 years.

I then visited the San Diego County Flood Control office, and obtained figures from them on rainfall, and furnished them with a USGS map pertaining to the area surrounding and upstream from the Sutro property, and together with that office assisted in their calculations, the calculations which they made as to the area of the upstream watershed, the number of second-feet of flood water that comes down the channel on rain statistical data, and obtained what information I could from them as to their knowledge of water conditions in that area.

I then went to the Santa Ana Mortgage and Investment records. They are held by the First National Bank, but I have access to them since I am the holder of the remaining assets of the Santa Ana

(Testimony of Stanley E. Goode, Jr.)

Mortgage Company myself, and have full access to their records. And in that connection I went through their files, back to the files of the lawsuit in 1927 on the subject property over water, Cruikshank v. Cox, and reviewed the conditions under which the Santa Ana Mortgage [1271] Company and the First National Bank came into ownership of the subject property, and the correspondence that took place between various brokers and various people who requested information about the property, and leases, offered to lease the property during those periods of time, and read the letters in the file which Mr. Ikemi had written to the bank at the time he was buying the property on contract, describing the crops that were grown and the conditions of hazard that existed on the property at various periods under his ownership. I also read the minutes of the board of directors written by Mr. W. B. Williams, who was the president of the bank, and Mr. A. P. Traywick, who was the cashier, and Mr. A. I. Mellentine, who was at that time manager of the bank and is now connected with the Bank of America at Los Angeles; all of these gentlemen who visited the property during the period of time that Mr. Ikemi owned the land, and made written notes as to the conditions that they found on the property during that period of time.

I have examined all those records in detail, for the purpose of getting as much historical background as I could about the untility of this land

(Testimony of Stanley E. Goode, Jr.)

and the farming practices on the property, the availability of water, and the actual conditions of the land during the period of time that the Santa Ana Mortgage Company was interested.

I also obtained some photographs taken of the subject [1272] property as far back as 1927, and some interesting maps in connection with that investigation.

Mr. Cranston: If the court please, I didn't get the date.

The Witness: Which date, sir?

Mr. Cranston: The last date. Was that 1947, or '37, the date of the photographs?

The Witness: 1927.

Mr. Cranston: 1927?

The Witness: Yes, sir. I obtained a copy of Bulletin No. 59 from the County Health Department, and talked to County health officials in San Diego County and in Orange County for the purpose of discovering something of the history of the pollution there, and an interpretation of some of the rules that are laid out in that bulletin.

I made a complete physical examination of the subject property as to its contour, and the type of growth, and the soil conditions. In connection with my soil investigation, I was guided there by the government soil map that is prepared on the property, together with the tax factor map, and in conjunction with an aerial photograph, a dehandled shovel, a soil tube, and a kit for testing the acidity or alkalinity of the soil, I went over various por-

(Testimony of Stanley E. Goode, Jr.)

tions of the property and made observations as to soil texture, soil depth, alkalinity or acidity at the various soil depths, and [1273] was able to break these soils on a Storie rating system for my own particular use, not as a mathematical approach to value, but as a method of judging the value agriculturally. And these individual areas were plotted on the aerial photograph, and transferred from that to a tracing, and the individual areas were computed, that is, the classifications of land were computed by myself off the aerial photograph, using a polymeter to determine the irregular areas.

Q. And those maps and photographs are now available?

A. I don't have them with me at the moment, but they are available in my files; everything that was used.

I interviewed a number of people in connection with obtaining information about the general area.

I talked with Mr. Zuckwieler in connection with the background of the conditions of pollution, as to the method of testing, and a few things of that nature. I talked to Miss Whelan.

Q. Who is Mr. Zuckwieler?

A. He is now retired. He was formerly an employee of the San Diego County Health Department, who made tests of the water, the polluted water on the subject property, and, as I recall, was the gentleman who tested the water at the time the letter mentioned in the transcript was sent to Mr. Brown asking him to cease raising edible vegetables.

(Testimony of Stanley E. Goode, Jr.)

I talked to Miss Whelan, who was a tenant on this [1274] property, and who owns adjacent property to the south, with regard to the condition of the soil on the property in the area of the ranch that she farmed, the designated areas that she planted to different crops; inquired as to the length of time she was on it, as to the success or failure of the crops which were planted there; as to water conditions, the amount of water, and various other items pertaining to the subject property, as well as the general area.

I talked to Mr. Rex McDaniel, who was also a tenant on the property, and inquired as to things of the same nature from Mr. McDaniel.

I believe that I mentioned the gentleman connected with the First National Bank at Santa Ana, Mr. W. B. Williams, and E. B. Sprague, and A. W. Mellentine. The information that was obtained from them was on their field observations and on the history of the property.

I talked to Ed Pankey and Bob Pankey, both of whom are farming substantial acreages in the area I previously described as the Pankey ranch, and have been farming in there for some time, farming alfalfa, lima beans, truck crops, irrigated pasture, dry pasture, and so forth, and who have been in the lessor and lessee positions both on agricultural leases in the area for many years, and are familiar with conditions existing there in the San Luis Rey Valley. I inquired from them about their opinions of the adaptability of [1275] the Sutro property. I

(Testimony of Stanley E. Goode, Jr.)

asked Bob Pankey about his recollections of the property, which he had been on previously in connection with his official duties as a member of the board of directors of the San Luis Rey River Water Conservation District.

I was able to obtain information as to what both of these men thought the subject property was best suited for in crops, and what these crops would yield, and what they felt the good and bad points about the property were.

I also interviewed Mr. Travis Flippen, who has farmed for a number of years just above the San Luis Rey River there, between the Pankey ranch and the subject property, and who has grown lima beans, black-eyed beans, truck crops, alfalfa, and has also leased his land for these purposes during some portion of that time.

Mr. Cranston: Might I ask you to restate that gentleman's name?

The Witness: Travis Flippen, F-l-i-p-p-e-n.

Mr. Cranston: Thank you.

The Witness: And I talked to Clarence Nishizu, who was one of the most extensive operators of truck crop land in that general area, and asked him questions about crop adaptability, about the productivity of this subject property, which he had been on within 30 days of the time I talked with him, for the purpose of finding out what rent he would pay for the [1276] property; and I was able to get his opinion of the rental value of the property, what crops it was best adapted to; the type of

(Testimony of Stanley E. Goode, Jr.)

production that could be expected; and various comments about the property itself, as to the conditions that existed there.

I talked to Mr. Paul Bailey, who is the water engineer for the San Luis Rey River Valley Water Conservation District, to obtain information about the geology of that area, as to the water conditions, availability of water in the vicinity and beneath the Sutro land, and the general district surrounding it, and, against, about the watershed, and the nature of the watershed, and the runoff down Pilgrim Creek. He had been on the property, and was familiar with conditions there, and knows that land.

I contacted the Eleventh Naval District, and obtained the information which they had as to the production of lands on Camp Pendleton that are currently leased to private operators for the various purposes of growing flowers, truck crops, black-eye and lima beans, hay and grain, and was able to obtain the rents being paid and the conditions under which those rents are being paid, for use in comparison.

I carried on my analysis by utilizing this classification of acreages of the land in trying to analyze what the optimum use was of each of the classifications, and to compute it out, and by making comparisons of these lands with [1277] the other lands that had been sold and rented in the district, obtain some relationships useful in estimating the value of this property.

(Testimony of Stanley E. Goode, Jr.)

My value, of course—my estimate of value, of course, is based on comparison of actual sales that occurred during that period of time. My rental value is based on comparable leases on other lands, by comparison of those, and by an analysis of the crop share relationships converted into dollars and cents in the value of land.

And I made an effort, in connection with the study of sales and leases, to determine the relationship between rent and value, as regarding an acre of ground with a given value, at what percentage of that value should an acre rent in pattern of lands generally in that district, each farming district having a characteristic of that type, wherein there is a very definite relationship between rent and value, and I utilized the data which I obtained on rentals and sales in order to analyze and get an opinion of that relationship between rent and value.

Then after using that as an additional check, why, I was able to form an opinion of both rental value and fair market value.

Q. (By Mr. Weymann): Now, Mr. Goode, on the basis of your analysis, you had prepared a classification map, had you not, of the subject [1278] property?

A. I have just a small classification map in my own notebook here, and I have just a single copy with me. I have a large map, four USGS maps, put together, with numbers on it showing the location of the data.

Q. Yes, that is the map I have reference to.

(Testimony of Stanley E. Goode, Jr.)

A. Yes.

Mr. Weymann: Now, your Honor, if we could put those maps over on the board over by the witness chair, so that he can refer to them.

The Court: Yes.

The Witness: May I leave the stand, your Honor, to assist them?

The Court: Yes.

Mr. Weymann: May that be marked defendant's exhibit next in order, for identification?

The Clerk: That will be Exhibit DD, for identification.

(The document referred to was marked Defendant's Exhibit DD for identification.)

Q. (By Mr. Weymann): Now, Mr. Goode, those basic survey maps are official maps, aren't they, which you have assembled?

A. Yes, they are. They are USGS maps which I purchased, and have joined the four so as to show a larger area than could have been shown on one single map.

Q. Calling your attention to the red and green circles, [1279] with numerals in them, did you place those on the maps?

A. Those were actually placed on this copy of the map under my direction.

Q. And what do they represent?

A. They represent the sales and the listings of

(Testimony of Stanley E. Goode, Jr.)

other properties which I found in that district.

Q. And which represent the sales?

A. The green numbers represent the comparable leases, and the red numbers are indications of the fair market value in the form of sales, offers or listings of property.

Q. And the area colored in yellow represents the subject property, does it? A. Yes, sir, it does.

Q. You made no attempt, of course, to delineate on that map the precise area of those leases and sales?

A. No, I did not. They were too extensive for the problem.

Q. But just to show the location, and those represent the data which you gathered as to sales of property and leases of property in the course of your investigation; is that correct?

A. Yes, sir. It represents the sales of 8,000 acres of land, all totaled, and the leases on 4,300 acres of land.

Q. Mr. Goode, is there a pointer there? [1280]

A. No, sir, there is not.

The Court: That is something which I think we do not have in this spacious courtroom, so we will have to dispense with the pointing at this time. Is it the sales that you want him to identify?

Mr. Weymann: Just to identify the sales and the leases, and state what the consideration was, and the nature of the operations carried on there.

The Court: Are those the sales that you men-

(Testimony of Stanley E. Goode, Jr.)

tioned in the narrative of your qualifications, Mr. Goode, or were there others?

The Witness: I don't believe I mentioned any of the sales specifically that are involved here. I did mention one property. That was the Pankey ranch. That is one item marked No. 33 in red on the map, but these are all properties that I haven't previously mentioned.

Q. (By Mr. Weymann): To clarify the question, Mr. Goode, those are not properties which you have appraised? A. No, sir.

Q. Those are properties which you have investigated as to sales?

A. That I investigated in connection with this problem. I obtained information about those properties. That is why they are indicated on the map. They, however, were not an indication of the value or rental value, as the case may be. [1281]

Q. All right. Then let's proceed.

The Court: Did I understand you to state that those marked in red represented the sales?

The Witness: Yes, sir.

The Court: And you said something about the figures that are in those red markings. What are they?

The Witness: They correspond to my individual data sheets in my notes, where I have the information.

The Court: And what do they represent—the figures?

(Testimony of Stanley E. Goode, Jr.)

The Witness: The number means nothing, except for identification purposes.

The Court: This is going to consume some time, I see. I thought perhaps we could get his opinion in the record today, but if you want to go at it this way, I suppose we will have to take the time. It is now 4:30, and I think we will resume tomorrow at 10:00 o'clock. We ought to be able to speed up a bit now.

Mr. Weymann: I think we can, your Honor. I think we have it organized so that we can.

The Court: Very well. 10:00 o'clock tomorrow morning, gentlemen.

(Whereupon, at 4:30 o'clock p.m., an adjournment was taken until 10:00 o'clock a.m., Friday, March 5, 1954.) [1282]

Friday, March 5, 1954—10:00 A.M.

The Court: Proceed, gentlemen.

STANLEY E. GOODE, JR.

the witness on the stand at the time of adjournment, having been heretofore duly sworn, was examined and testified further as follows:

Direct Examination

(Continued)

By Mr. Weymann:

Q. Mr. Goode, when the court recessed last night, you had testified as to certain investigations that you had made as to rentals and market value and

(Testimony of Stanley E. Goode, Jr.)

land in the vicinity of the subject property, and those were depicted by you on Defendant's Exhibit DD, I believe it is, for identification?

A. Yes, sir.

Q. Now, are all of the sales and rentals which you investigated depicted on that map?

A. Not entirely, Mr. Weymann. At the left-hand side of the exhibit to which you referred, you will note the numbers L-12 to L-29 in green, and that indicates a series of transactions. Rather than putting all the individual numbers on there, that was referred to as a series, which includes individual items bearing all the numbers between 12 and 29, inclusive.

Q. And those numbers are merely references to your detailed [1284] data as to those sales and rentals; is that right?

A. That is correct.

Q. Do you have those data with you, and are you prepared to testify as to those details, if you should be asked by the court or by counsel?

A. Yes, sir, I have. I have them here.

Q. Those cover the period from 1946 to the present date?

A. That is correct.

Mr. Weymann: Well, we won't go into the details of those, if the court please, because that would occupy too much time. However, I would like to introduce that as the defendant's exhibit next in order.

The Court: So ordered.

The Clerk: Are you referring to the map?

Mr. Weymann: I am referring to the map.

(Testimony of Stanley E. Goode, Jr.)

The Clerk: That is Exhibit DD in evidence.

(The exhibit referred to was received in evidence and marked Defendant's Exhibit DD.)

Q. (By Mr. Weymann): Now, Mr. Goode, in preparing yourself to testify in this action, what factors did you consider?

A. I considered that this ranch consisted of approximately 298.10 acres in total. I might say that the exact acreage is a little in question, but the variation wouldn't affect the valuation for this purpose. And that this land was distributed between various classifications, which I will indicate, [1285] and can indicate on a sketch which I have prepared, if the court desires.

There were 37.5 acres of irrigated bottom land and 19.05 acres of irrigated slopes adjacent to the bottom land, making a total of 56.55 acres, which I am referring to when I use the term "bottom land."

The mesa land contained 25.8 acres of irrigable land.

Mr. Cranston: What was that figure, Mr. Goode?

The Witness: 25.80, thus arriving at a subtotal of 82.35 acres capable of irrigation.

In addition there were 54.60 acres of dry farm land and 18 acres of alkali ground in the flat, which is physically capable of irrigation, but not included within the above irrigated land classification due to its alkaline condition.

The balance of the property consisted of 129.31

(Testimony of Stanley E. Goode, Jr.)

acres, including mostly dry pasture, creek bottom, ranch roads, and waste land. Including the ranch roads and wash land, there is an additional 13.84 acres that I didn't mention, giving a grand total of 298.10 acres.

I considered the fact that these lands were irregular in shape, and interspersed by various irregular areas of pasture, and so forth, that they weren't rectangular or square fields, and I considered the economics involved in connection therewith, as to the operation of this as an agricultural property.

Q. (By Mr. Weymann): By the way, Mr. Goode, did you prepare [1286] a sketch of the subject property showing your soil classifications and the various acreages to which you have testified?

A. Yes, Mr. Weymann, I did.

Q. I have shown this to counsel, and I will show this to you, Mr. Goode, and see if that is the sketch which illustrates your division of the acreages and the soil classifications which you have given.

A. This sketch does contain my computations. I prepared the outline of the areas, drew the original of this map, the copies were prepared under my direction, and the figures which it bears as to soil classifications are my conclusions as to the soil types that are involved on the various parts where they are indicated, and the areas shown in acreage are the areas which I computed with a polymeter myself, based on field observations, aerial photograph, and tax factor map, and so forth.

(Testimony of Stanley E. Goode, Jr.)

Mr. Weymann: May that be marked into evidence?

The Court: No objection, Mr. Cranston?

Mr. Cranston: No, your Honor.

The Court: So ordered.

The Clerk: Into evidence, your Honor?

The Court: Yes.

The Clerk: That will be Defendant's Exhibit EE in evidence. [1287]

(The exhibit referred to was received in evidence and marked Defendant's Exhibit EE.)

The Court: Do you have copies of that, Mr. Goode?

The Witness: I have my copy, and this one copy is all, your Honor.

The Court: You might let counsel have it. I will look at it later.

Mr. Cranston: If your Honor wishes to look at it, I can look at it during the recess.

The Court: I just want to look at it for a moment, but when he testifies you will want to have it before you.

I have looked at it. Proceed, Mr. Weymann.

Q. (By Mr. Weymann): What else did you consider, Mr. Goode?

A. I considered the fact that the house well, referred to as the well on the mesa, was polluted in supply for a period of seven years, during the period from 1946 through 1952, and that this was a water well unequipped as to irrigation pumping facilities,

(Testimony of Stanley E. Goode, Jr.)

and that would have produced reportedly 33 inches of water, irrigation water, sufficient to take care of approximately 33 acres.

That irrigation well No. 2, which was the well Mr. Sutro drilled below the mesa on the flat, was polluted in supply for a period of two years, between 1950 and the end of the damage period in 1952, and that that water supply, into which [1288] that well was drilled, was known to be polluted at the time. And I considered the fact that that well is reported to produce 44 inches of water, and the fact that it consists of a well casing without pump or motor and is, therefore, not during this period of time capable of the delivery of water without the installation of equipment on it.

Q. Incidentally, Mr. Goode, there has been testimony here as to the number of gallons the well was capable of producing. Have you converted that into inches?

A. Yes, I have. The relationship is 9 gallons per minute equals 1 inch, and the inch of water referred to is the quantity required to irrigate one acre of land, and for that reason I preferred to express my statements in inches, because I believe that it is more simple to understand.

Q. All right. Proceed, Mr. Goode.

A. I considered that the Pilgrim Creek flow was polluted as to supply for the seven-year period from 1946 to the end of the damage period in 1952. And I considered that in addition to the normal flow of Pilgrim Creek, which had been previously used on

(Testimony of Stanley E. Goode, Jr.)

the property of Mr. Ikemi, there was an additional rather substantial quantity of approximately 80 inches of water coming down the stream from the installations of sewage treatment plants on Camp Pendleton.

I considered in this connection that plant No. 1 had an average daily flow, which fluctuated over the years depending [1289] upon the personnel in the camp, all the way from 307,000 gallons per day up to a high of 741,000 gallons, and that plant No. 2, during the period 1945 through 1950, had a flow varying from approximately 339,000 gallons up to approximately 580,000 gallons of water.

These statistics are based on Mr. Cannon's previous testimony in the trial.

I considered that during the period from January of 1946 to August of 1950, or for a period of five years, that water supply available during that five years consisted of 33 inches from the house well, a reported 30-inch flow, based on the water that naturally was available in the creek through pumping from the pit in the manner that Mr. Ikemi previously had, and that the Navy sewage water accounted for an additional 80 inches, so that during that period of five years there were 143 inches of water available, which water, of course, was polluted during that five-year period.

Then I considered that from August, 1950, to December, 1950, the Navy sewage water had decreased in supply, because plant No. 1 had been diverted and that, therefore, the Navy sewage water

(Testimony of Stanley E. Goode, Jr.)

merely amounted to approximately 30 inches at that time, in addition to the 30-inch creek flow, natural creek flow, and the 33-inch house well, which left a total for that four-month period of 93 inches.

Then I considered that between December of 1950, which was [1290] the time that Mr. Sutro drilled the irrigation well No. 2 in the flat, and July of 1952, the end of the damage period, there was a total of 134 inches of water available, consisting of 33 inches in the house well, that 30 inches of natural flow of Pilgrim Creek, and 30 inches of Navy sewage water up until the time that plant No. 2 was diverted into the Santa Margarita watershed.

I considered in that connection that the only measurement we had, or, rather, the only indication statistically that we had as to the flow of Pilgrim Creek, the natural flow before the sewage water was placed in the creek, was from information furnished by Mr. Ikemi, and I considered the fact that during his term of ownership we had several years of extremely heavy rainfall, in fact record rainfall, and I considered the fact that that may have affected the water availability in Pilgrim Creek in subsequent dry years, although I didn't reduce his estimates in these showings of the total inches available during that period of time.

I also in that connection considered the information given to me by Mr. Paul Bailey and Mr. Thomas of the San Diego County Flood Control regarding water conditions in that watershed, and the nature of it, and the availability of water.

(Testimony of Stanley E. Goode, Jr.)

I considered the hazards of flood, frost, and drainage as they pertained to the property.

I considered the information by Mr. Thomas, the San Diego [1291] County Flood Control Engineer, furnished me, indicating that on a 20-year flood 1900 cubic feet a second of water came down Pilgrim Creek, which is 3.35 times the capacity of the creek channel, and I considered that in the light of the economic soundness or unsoundness of spending money on lands which would be affected by that hazard in the event of a 20-year flood for leveling and installation of irrigation systems and anything that would require development and expenditure of money on the flat ground that is exposed to that hazard.

I also considered in that regard the practicability or impracticability of reclaiming the alkali area which at the lower end of that flat, consisting of 18 acres, is likewise subject to that same hazard.

I was able by personal observation to support his calculations by some measurements which I made in the creek right after a rainfall of known amount, and reporting to him from the field actually the amount of water, the depth of water that had been in the channel, which supported his calculations.

I considered the fact that if this land had had an unpolluted water supply——

Q. Before you pass to that, did you have any information as to any frost hazard?

A. Yes, sir, I did. I previously testified that I

(Testimony of Stanley E. Goode, Jr.)

had [1292] examined the letters written by Mr. Ikemi during his ownership, and I examined the letter which he wrote on November 12, 1938, stating that frost had ruined all——

Mr. Cranston: If the court please, I will object to the statements that the witness, Mr. Ikemi, made in the letter. Mr. Ikemi was on the witness stand, and was subject to cross-examination, and they did not go into this then, and I submit he should not be able to state at the present time what was in a letter which he saw that Mr. Ikemi wrote.

Mr. Weymann: If the court please, the witness is stating the sources of information on which he reached his conclusion.

The Court: But the source of the information must be either in the record at this time or consist of official documentary evidence, and this would not be in either of those classifications, according to my recollection. I don't recall that Mr. Ikemi referred to the letter. Perhaps I overlooked some of them in the case at San Diego, but I don't recall any letter in the record from Mr. Ikemi to that effect.

Q. (By Mr. Weymann): Do you have that letter, Mr. Goode?

A. No, sir, I do not. The letter is in the files of the First National Bank in Santa Ana, and the files of the Santa Ana Mortgage Company, but I do not have the letter with me. I have examined it, and I am prepared to state what the contents are of that letter.

(Testimony of Stanley E. Goode, Jr.)

The Court: Don't state what it is. That is what their [1293] objection was.

The Witness: I see.

The Court: And I think their objection is well taken.

Q. (By Mr. Weymann): All right. What is the next matter that you considered?

A. I believe I started to enumerate the crop adaptabilities of this land under a condition of unpolluted water as against polluted water, and the crops which I will mention here in this first group refer to the 56.55 acres of irrigated flat. On that land, with unpolluted water the land is adapted to the production of alfalfa, which can either be cut green or baled. And under polluted water, the same condition prevails, the same utility as to that crop. However, its position as a crop would be somewhat enhanced by the additional availability of water at creek level rather than at well bottom level, some 80 feet lower.

The land likewise is adaptable to irrigated pasture under either unpolluted or polluted conditions. And there again the presence of additional water would make it more desirable for pasture land.

The land is adaptable under both conditions for Sudan grass, or seed crops, or for the growing of commercial flowers.

Under conditions of unpolluted water, the land is well adapted to the production of black-eye beans or lima beans, [1294] which, in my opinion, would develop a rental of \$60 to \$65 per acre.

(Testimony of Stanley E. Goode, Jr.)

And under conditions of polluted water, these same two crops, black-eyes and lima beans, can be grown by pre-irrigation, which consists of a complete thorough irrigation of the ground before the seeds are planted, and then no application of polluted water during the growing of this crop, which is necessary for it to comply with the health regulations.

Q. Is pre-irrigation usual and customary?

A. It is very widely used in the growing of both black-eye and lima beans in the vicinities of Orange, San Diego, Los Angeles, and San Bernardino Counties, and Riverside County, and I am prepared to name a wide number of areas—I mean within that—where that practice is used in the irrigation of these crops, that is, not with sewage water that I am referring to. However, I can also illustrate on the Irvine Ranch where the sewage water from the El Toro Marine Corps Station, coming from Imhoff tanks, is used for the pre-irrigation of both lima and black-eye beans.

The land could likewise be adapted, under conditions of unpolluted or polluted water, to the growing of corn for silage, or for the growing of sugar beets.

There are crops which, as a group, could be classed as truck crops which cannot be grown except under conditions of unpolluted water, and I believe that the crops that can be [1295] grown on the property, while this may not constitute all, it constitutes a good section of the crops that it is adaptable to, would

(Testimony of Stanley E. Goode, Jr.)

consist of asparagus, chili peppers, strawberries, cabbage, cauliflower, celery, broccoli, peas, tomatoes, corn, squash and lettuce.

These crops would be subject to frost hazard during the winter—not all, but most—and that would be a factor over and in addition to the question of pollution or unpollution that existed. But the land, in my opinion, could be devoted to the production of those crops, assuming proper weather conditions during the growing period.

Now, as to the 25.8 acres of mesa ground, which I class as irrigable mesa ground, it is the only land that I class as irrigated or irrigable other than the flat which I previously mentioned, under the condition of polluted or unpolluted water it is equally adapted to irrigated pasture, or to seed crops, or to the production of flowers. With respect to beans, the land is adapted to the production of beans as an irrigated crop, or beans as a pre-irrigated crop under conditions of pollution.

It likewise has the same general pattern of truck crops, with a few exceptions, such as chili peppers and asparagus, which I don't believe are adapted to that condition that exists on the mesa but, generally speaking, the same truck crops could be grown on the mesa land if the water were unpolluted, [1296] and if the water were polluted they would not be permitted to be grown there.

On the balance of the ranch, which is actually unaffected by the question of pollution or non-pollution of the water, referring now to the dry farm

(Testimony of Stanley E. Goode, Jr.)

lands, those lands are best suited to dry farming to black-eye beans, grain, barley, hay, and so forth, and the adaptability of those lands would be identical both before and after the conditions of pollution.

In this regard I might say that I considered within these individual classifications of land the typical rentals that are paid for them, and the amounts of rent which they develop on a crop share, and while I don't have in front of me mathematical support for each crop that I have mentioned out of this wide variety, I am prepared to state with regard to specific crops, generally speaking, what I think they will develop, and what the pasture land will develop in the way of rent on the various pieces that it is computed.

Q. In any event, those were matters which you considered? A. That is correct.

Q. Did you consider any other use besides those which you have mentioned ?

A. I believe that I have covered all except the conversion of that property into a cattle ranch or a dairy. I think that the greatest consideration between those two was given to the operation of that land as a beef cattle ranch, including a [1297] combination of wet pasture and dry pasture, with a possibility of some feed growing on the dry farming areas in connection with the operation, and utilizing the surplus water, polluted water available in the stream during that interim period of rental loss, the damage period I am making reference to, diverting that water so as to irrigate the pasture and at the same

(Testimony of Stanley E. Goode, Jr.)

time enhancing the position of the land, and accomplishing this without an expenditure of money for any permanent elaborate systems, or anything of that nature, and at the same time providing a good rental return because of the beef cattle situation during that period of time.

Q. What other matters did you consider, Mr. Goode?

A. I considered in that light of the pasture operation, the comparable rentals of other pasture on the various methods.

I considered that the bottom land, again referring to the 56.55 acres, would have rented at figures varying from \$50 to \$60 per acre with unpolluted water, and with polluted water at figures varying from \$25 to \$50 per acre.

I would like to explain that spread as being one that refers to time, that is, the difference in year, and with that the difference in stage, that, for example, a crop of alfalfa might be in wherein during its first year, its initial planting year, it is not producing the amount of crop return on a crop share it would during its second year and its third year, [1298] and during the final stage of the alfalfa it would likewise tend to reduce to a lower figure. So these are outside figures within the range that I computed.

I considered that the alkali land, consisting of 18 acres, was unaffected by the pollution, since the land was best suited for wet pasture, and for that pur-

(Testimony of Stanley E. Goode, Jr.)

pose would bring a rent of \$10 per acre per year under either condition.

The irrigable mesa land, consisting of 25.8 acres, I felt had a value, a rental value, of \$35 per acre if unpolluted and that with polluted water this same land would rent for approximately \$20 per acre.

I considered that the dry farm land would rent for \$20—that is, develop an income of approximately \$20 per acre, and that that would be unchanged with water pollution. And that the pasture land would develop an income of approximately \$2.50 per acre per year, and that likewise would remain unchanged under conditions of pollution.

I considered the historical facts that I was able to ascertain about this property, the crops which were grown during Mr. Ikemi's ownership, the success and failure of these, the areas that were irrigated, and, of course, the observations of the gentlemen whose names I have mentioned previously, who were on the property during that period of time, with a view to obtaining as much information as possible about what actually had been done on the property, or had been indicated as [1299] practical by the farming operations of the previous two owners. And in that connection I obtained all the information, and considered all the information about hazards, and so forth, that was written in various documents within the files of the Santa Ana Mortgage Company, now held by the First National Bank.

I gave consideration to these sales and offerings,

(Testimony of Stanley E. Goode, Jr.)

referring to 8,000 acres of land, or involving 8,000 acres of land, and likewise gave consideration to the leases on 4,300 acres of land. These each involved approximately 30 transactions. And in that regard I gave consideration to the relationship between rent and fair market value during the various periods of time on which I had data. I tried to, and did, arrive at calculations as to the relationship between rent and value or properties of different classifications in that area, and was able to make, of course, comparisons on a wider spread basis with previously developed information on other areas where I had made these similar calculations, for example, the Chino Valley, the Orange County area, the Oxnard-Ventura district, the Sacramento Valley, and places of that nature, to see how this correlated with the relationship between rent and fair market value in those other areas.

Q. And how did that relationship develop?

A. The relationship in that area, in my opinion, is 10 per cent of the fair market value. If a piece of land is [1300] worth \$1,000 per acre, it will rent on a cash rent of \$100 an acre; if it is worth \$500 per acre, it will rent for \$50 an acre. And it is interesting to note that that relationship prevails right on down to the pasture lands, in many instances, down to the lowest classifications of land. Now, there are some variable conditions from that, but that is a general condition that exists within that area.

Q. All right, Mr. Goode.

A. I considered in this connection the home site

(Testimony of Stanley E. Goode, Jr.)

qualities of that property, that it is located in a pleasant valley, with good surroundings, and an ideal climate for living conditions, certainly a desirable area in which to locate, but that it had no exclusive condition there on this property that wasn't prevailing also in the surrounding areas nearby.

I considered with regard to the development of the property, that is, further installations or changes in the property which would be connected with its farming operation, that it would be impractical to attempt to fence the ranch, because of the irregularity of the pastures and the fact that the cost of the fence would exceed the value which it would purport to enclose.

I considered with regard to the development of the bottom land, and by "development," I am referring now to installation of permanent irrigation lines and leveling and alkali reclamation of the flat, that it wouldn't be practical in view of the [1301] hazards that exist there as to flat and also that the feature of, well, the law of diminishing returns would enter into it as to the amount of increase in value of the return that you would get, as compared with the cost involved in certain instances.

Q. By that do you mean that the cost of development is not necessarily reflected in any increased value of the property?

A. Sometimes the cost of development will be greatly exceeded by the resulting increase in market value, such as in the instance of a dry piece of land

(Testimony of Stanley E. Goode, Jr.)

where a well and equipment is installed at a cost of \$5,000, it might increase the land value by \$10,000 or \$15,000. On the other hand, you might spend \$5,000 in leveling and increase the value of the land \$5,000. In another instance, where this law of diminishing returns comes into effect, you might spend \$10,000 on a piece of property, and only result in an increase in value of the property of only \$2,500, which is a matter of astute computation to determine where the stopping point is, where it is economically practical to stop.

Q. Does that cover the matters you took into consideration?

A. I believe it does, Mr. Weymann.

Q. And based on that analysis and investigation, and the examination of the property, and the investigation of sales [1302] and leases of surrounding properties, have you arrived at a conclusion as to the fair market value of that property in 1946, January of 1946?

A. Yes, sir, I have.

Mr. Cranston: If the court please, is this a proper matter for inquiry, the fair market value, in this proceeding?

The Court: I do not want to go into it too extensively, because it will lead to a narration of extraneous matters to an unlimited degree. It does have some effect on the rental value, but not too much in this case, I think, because of the peculiar situation in the case. I don't believe I care to go into that. I am afraid it is going to lead us into

(Testimony of Stanley E. Goode, Jr.)

other avenues of that feature.

Mr. Weymann: The only thing I want to establish here, your Honor, is the value of that property in 1946, in the condition that it existed, and the value of it which would have obtained had the pollution not existed.

The Court: If you will frame your question so as to obviate a lengthy discussion of details, I will permit the figures to be given. But I am not going to go into that in an exploratory manner.

Q. (By Mr. Weymann): Mr. Goode, have you an opinion as to the diminution in the market value of that property at the time Mr. Sutro bought it, by reason of the pollution of the water? [1303]

Mr. Cranston: If the court please, I do not believe that that is in line with the court's instructions.

The Court: No, it is not. If they want to go into the matter in detail on cross-examination, without prejudging the matter at this time, I do not see how I could restrict the cross-examination, but it is not proper on direct examination in this case, in my judgment, to explore the value of the property, because we are not accepting it insofar as that reflects something about its rental value. We are not concerned with it under the rulings the court has made.

Mr. Weymann: The reason for that, your Honor, is this: That the witness has just testified that there is a relationship.

The Court: Why can't you ask him a question

(Testimony of Stanley E. Goode, Jr.)

to draw from him what he thinks the property was worth, without going into it in a round-about method which will lead to a number of questions which I think are within the objection that counsel has made?

Q. (By Mr. Weymann): Then I will ask you, Mr. Goode, what in your opinion was the property worth in 1946?

Mr. Cranston: Will you specify whether you consider the matter of polluted water in the question? Under what conditions are you asking for the value of the land?

Mr. Weymann: Under the conditions that existed at that time. [1304]

The Witness: Under the conditions that existed on the property as of January, 1946, the property had a fair market value of \$34,000.

Mr. Weymann: Well, now, under the court's ruling—I don't want to trespass upon that—my purpose then was to ask him what would have been the fair market value had the water not been polluted. If that comes within the scope of the court's ruling, why, I will not ask him.

The Court: I think it does, because the water was polluted. It was polluted at the time of the purchase by the plaintiff.

Mr. Weymann: Very well.

Q. (By Mr. Weymann): Now Mr. Goode, have you reached a conclusion as to the diminution of rental value of the subject property by reason of the pollution of the water, from the time of the pur-

(Testimony of Stanley E. Goode, Jr.)

chase to the time the water from Camp Pendleton was diverted into the Santa Margarita watershed?

A. Yes, sir, I have.

Q. And, in your opinion, what is that diminution in value?

A. \$10,000. That is the total figure for the seven years.

Q. That is the total figure. Now, Mr. Goode, will you please state your reasons for the conclusions which you have just expressed? [1305]

A. One of the reasons that I arrived at these estimates is that the property had certain features of uncertainty connected with its operation and development during that period of seven years; one referring to its domestic water supply. Secondly, it had uncertainty with respect to the installation of the irrigation system, referring to portions—we will say, the domestic water system and the development of the mesa well, and as to the installation of pumps on these unequipped wells. There was uncertainty that existed with regard to any building program, that again referring back to the question of availability of domestic water, and there was uncertainty that existed as to the leveling of the land, the advisability of leveling because of the water conditions that existed, that coming into play because the degree of leveling has some bearing on the type of crop which is to be grown.

There was uncertainty as to the advisability of installing additional wells, pipelines, or anything further connected with the water system, and uncer-

(Testimony of Stanley E. Goode, Jr.)

tainty as to whether to attempt lifting water from the creek in the manner that Mr. Ikemi previously had for the irrigation of his crops. I am referring there to the natural flow, and the sewage flow.

And there was uncertainty, of course, as to the esthetic characteristics of the property, as to whether or not there would be any unpleasantness connected with having sewage water flowing down Pilgrim Creek. [1306]

In this connection, the last four items which I have mentioned, the leveling of the land, the uncertainty of the leveling, the uncertainty over installing wells, pipelines, and water system, referring to irrigation water, and the uncertainty of lifting the water from the creek, and the uncertainty over esthetic damage, were all factors that existed on the property as of the date of purchase.

The previous items, referring to the building program and the installation of the domestic water system, referred to items which subsequently came about, uncertainties that were not in existence at the time the property was purchased.

I then gave careful consideration, among my reasons, to the things that a prudent operator would do, faced with these uncertainties, and this is based on my own observations there, and my own observations of other farming operations, and my opinion as developed from interviewing a number of operators.

I think that a prudent operator would utilize the

(Testimony of Stanley E. Goode, Jr.)

free ditch water, that is, the free water in Pilgrim Creek, and when I say "free," I mean free subject to a lift of five or 10 feet, enough to boost it out of the creek level onto the field into a ditch, with a sufficient flow thereby existing for 80 acres of irrigation. A prudent operator would have investigated the wide variety of crops which could have been planted on this land under conditions of pollution, the crops that I have previously stated. [1307]

He would have inquired into his ability to lease that land, the market for a lease on that land, which would net to him, or, rather, bring to him a gross rental of 10 per cent of the purchase price that he had paid for the property, without making any changes in the property at all, and without development, and thereby provide a substantial income from any interim period of uncertainty.

The prudent operator would consider the possibility of installing portable pumps and sprinklers, at his own expense on the property, in order to lease it, or the alternate possibility of leasing it to a tenant who would provide his own portable pumping equipment and portable sprinkler system for irrigation.

A prudent operator would have seriously considered the limitations placed on the flat ground by the flood hazard, and that the limitations I am referring to again are the leveling, the development of any leveling in water system, and alkali reclamation.

The prudent operator would have, in my opinion,

(Testimony of Stanley E. Goode, Jr.)

restricted the grain farming. He would not have farmed the flat ground to grain, but would have restricted it to that 54.6 acres which I previously mentioned in my acreage allotments as the dry farm area.

The prudent operator would have irrigated the 56½ acres of the flat ground and 25.8 of the mesa ground, and [1308] would have used the 18-acre alkali area and the balance of the pasture that is on the land for grazing as it was permitted, depending upon the condition of the other fields; when the other fields had no crops in them, that the cattle could disturb, and then the entire ranch within its exterior limits could be grazed as a single unit without the construction of a fence.

I think the prudent operator would have had delivered to the ranch, or had carried to the ranch any drinking water supply used by either help or owner occupancy, and that the prudent operator would have given careful consideration to the installation of a chlorinator himself for clearing up the drinking water in the mesa wells, sufficiently so that it could be used for household purposes, we will say, short of drinking water, meaning dish water, bathing, and that sort of thing, or that he would have explored the area east of the mesa, adjacent to the Vanhisen property, where water is flowing from springs near that area, for the purpose of obtaining domestic water from another source.

I think the prudent owner of the land or prudent operator would consider that living accommodations

(Testimony of Stanley E. Goode, Jr.)

were available elsewhere, and that the land could be farmed without the presence on there, without living on the land, and he would consider that not over 70 acres of this land had ever been irrigated by the previous tenants, and that any expansion of the irrigated [1309] area over and above what two previous owner operators had done would be classed as slightly speculative.

He would consider that the water costs were low on the sewage water in the creek, and that is because of the small lift involved, and that they would be high on the mesa, where you have an effective boost to sprinklers of about 200 feet, that is, including the effect of the sprinkler itself, and he would have considered his water costs, not only in terms of the power necessary to run the pumps, but in terms of depreciation on any pipelines, dams, pumping equipment, including the maintenance and repair of those items, which is a substantially greater factor in water costs many times more than is the actual cost of the power.

The prudent operator would have installed a method of siphoning water from the creek to reclaim, that is, to make use of that water that was running through there, and, in my opinion, would have installed a pump on the mesa well.

And I believe that at that time, in January of 1946, the desirability of converting this into an irrigated pasture, a cattle ranch, would have been seriously considered by any prudent operator.

I also state among my reasons for my conclusion

(Testimony of Stanley E. Goode, Jr.)

of value the information to which I have previously testified, that I have developed through interviews, and through a comparison of sales and leases on comparable properties. [1310]

I believe that covers my reasons, Mr. Weymann.

Q. Now, you referred to the possibility of getting drinking water, and bringing in drinking water from other sources. Do you know of any instances in which that has been done?

A. Yes, sir, I do.

Q. In what instances has that been done?

A. I think the Imperial Valley is the best example, where all water for irrigation purposes in that area is ditch water and is not used for domestic purposes, and anyone who is on that land for the purpose of farming it, for the most part, carries his water to and from, as he does his equipment, and so forth.

Q. Now, Mr. Goode, if the water for the period under consideration, that is, from January, 1946, to 1952—assuming that the water were pure during the period considered, and came from the sewage disposal plants of Camp Pendleton, but did not meet with the equipment standards of Rule 4 of Bulletin 59, would there have been any difference in the conclusions which you have reached?

A. No, sir.

Q. Would that diminution in market value or rental value be different from the diminution to which you have testified?

A. No, sir.

(Testimony of Stanley E. Goode, Jr.)

Q. Do you have any opinion as to the necessity or economic desirability of the buildings and improvements and maintenance [1311] and utilities Mr. Sutro testified he intended to build?

Mr. Cranston: If the court please, I object to that as immaterial and irrelevant, as to whether those buildings were economically desirable or feasible. If Mr. Sutro wanted to build them, and was prevented from building them, that is up to him.

The Court: I believe that would invade the province of the court in this case. I do not think that is an evidentiary matter.

Mr. Weymann: Well, suppose, your Honor, Mr. Sutro evidenced an intention of building a large hotel there.

The Court: There is no evidence that he did.

Mr. Weymann: Well, I am stating that as a hypothetical question.

The Court: That is the reason I say it is an invasion of the power of the court, and the duty, the sole duty of the court, and not that of a witness.

Q. (By Mr. Weymann): Do you know of any ranches which you have appraised, or do you know of any case during the course of your investigation where ranches have been equipped with the same type and same extent of improvements as to which Mr. Sutro and the other witnesses have testified?

Mr. Cranston: If the court please, the same objection, that that is immaterial.

Mr. Weymann: I am asking if he knows. I am simply asking [1312] if he knows of any other cases.

(Testimony of Stanley E. Goode, Jr.)

The Court: Supposing he does know, and supposing the court within its province, does know the history of the times, and with its familiarity as to the terrain and the State of California, would have—and I am not saying that it has—a different view factually than that given by the witness, what effect or what value would the witness' testimony have on the court's decision?

Mr. Weymann: Well, of course, if the court has judicial knowledge of the history, of the terrain and the conditions obtaining there, I am perfectly satisfied to rest it on that basis.

The Court: I know a good deal about it. I have been around there for about 65 years.

Mr. Weymann: I appreciate that, your Honor, and if that is a matter of judicial knowledge——

The Court: I do not say it is judicial knowledge, no, but I am simply trying to point out the lack of value of evidence of that type in a case of this kind. I am not speaking of condemnation suits, where the government is seeking to condemn properties. I am talking of a Federal Tort Claims action, and anything that is within the cognizance of the court, because of its own experience, if it would run counter to the opinion or testimony of an expert witness: The court is supposed to exercise its own intellectual faculties, such as it has, without [1313] the aid of opinion evidence, if it has a knowledge of the subject. And I am not speaking of judicial knowledge in a practical sense. We have had a lot of experience in the trial of these cases and we know

(Testimony of Stanley E. Goode, Jr.)

something about the Imperial irrigation project, a good deal about it, because of litigation that has come before this court. Now, it would be impossible, and we are not going to do it, to eliminate that from this case when it comes to deciding the case.

The objection is sustained.

Q. (By Mr. Weymann): Mr. Goode, at the time you visited these premises and inspected them, did you take any photographs?

A. Yes, sir, I did.

The Court: And I may say also, just to amplify the ruling, and because of the mention of the Irvine Ranch, that we are quite familiar with some of those values; not of recent years, but some time ago, when we had the duty of estimating the value of those properties.

Mr. Weymann: I assumed so, your Honor.

Q. (By Mr. Weymann): I show you some photographs, Mr. Goode, and ask you if you took those photographs? A. Yes, sir, I did.

Q. When did you take them?

A. It was in February of this year. I can provide the exact date, if it is necessary.

Q. I doubt if that is necessary. But it was in February [1314] of this year?

A. Yes, sir.

Q. And what do those photographs show?

A. The first one is taken from the range land on the hill at the west side of the valley, looking towards Pilgrim Creek, and showing the—this is Pilgrim Creek running across the photograph at the

(Testimony of Stanley E. Goode, Jr.)

approximate center—showing the building group to the rear, and showing the Foss Lake area toward the right side of the picture.

Mr. Weymann: Will you mark that next in order, please?

The Clerk: That is Exhibit FF, for identification.

(The exhibit referred to was marked Defendant's Exhibit FF for identification.)

The Witness: The second one is taken from a position northeast of the building area, showing the shop building, I believe that is the term used, at the left of the photograph, and showing the position where Pilgrim Creek enters the ranch from the north towards the right of the photograph, showing the range land in the background, and the gum trees towards the southwest corner of the property.

The Clerk: That is Exhibit GG, for identification.

(The exhibit referred to was marked Defendant's Exhibit GG for identification.)

The Witness: The next photograph was taken from the hills just north of the gum trees that were shown in the [1315] previous photograph, and shows the alkali ground at the southerly end of the flat, and the property line between the Sutro and the Zahnhiser's properties at the location of Foss Lake.

The Clerk: That is Exhibit HH, for identification.

(Testimony of Stanley E. Goode, Jr.)

(The exhibit referred to was marked Defendant's Exhibit HH for identification.)

The Witness: The next photograph was taken from the extreme southwesterly hill, knoll on the property, showing in the foreground in front of the angular line an area belonging to Mr. Zahnhiser; showing immediately to the rear of that the lower end of the flat on the property, and the alkali ground towards the left side of that flat near the gum trees. The building group is shown in the far distance at the approximate center of the photograph.

The Court: Are the gum trees on the Sutro property?

The Witness: Yes sir, they are.

The Clerk: That is Exhibit II, for identification.

(The exhibit referred to was marked Defendant's Exhibit II for identification.)

Mr. Weymann: Now, I offer that series of photographs in evidence.

The Court: So received.

The Clerk: That is FF to II, inclusive, into evidence. [1316]

(The photographs referred to were received in evidence as Defendant's Exhibits FF to II.)

Mr. Weymann: You may cross-examine.

The Court: I think we will take our recess now.

(A short recess.)

The Court: Cross-examine.

(Testimony of Stanley E. Goode, Jr.)

Cross-Examination

By Mr. Cranston:

Q. Mr. Goode, I believe you stated that you had been an appraiser with your father since 1940; is that right?

A. That is correct; except for time in the service. But I was asked when I started, I believe.

Q. Yes. How long were you in the service?

A. 42 months.

Q. Did you study law at any time?

A. No, sir; just business law. I mean as a single course, but I never studied law.

Q. Now, you stated that in preparing for the trial of this case you obtained from the Land Title Company an abstract on property in the San Luis Rey Valley from Oceanside to Highway 395?

A. In that area, yes.

Q. Covering an area of approximately what size?

A. I think it was 16 square miles.

Q. What is the area of the San Luis Rey Valley between [1317] Oceanside and the point of intersection to which you referred?

A. That is an amount I couldn't state offhand, but it is less than that area, I believe, by quite a little. As to actual acreage within the valley itself?

Q. Well, I was thinking, what is the area of the land tributary to the San Luis Rey between Oceanside and the intersection of Highway 396, in the San Luis Rey?

(Testimony of Stanley E. Goode, Jr.)

A. I don't believe I can answer the question.

Q. Well, how did you select the particular 16 square miles within which to obtain the abstracts?

A. By judgment of the contours on that map. I attempted to select land that had similar contour characteristics running up that area, and the way their account books are set up, or, rather, their accounts are set up, you have to order on the entire section. You can't pick a portion of it.

Q. Then you did not take all the sections which are lying within the San Luis Rey Valley, within the area that you describe?

A. No, that is a fact.

Q. Isn't it true that the area in the San Luis Rey Valley between Highway 395 and Oceanside is in the neighborhood of 47 to 50 square miles?

A. Well, it would depend entirely on how you drew the boundaries of it. The square miles are indicated on the map, the sections are indicated, and the actual valley floor is indicated [1318] by the relatively white area, where there are no contour—that is, the contour lines are at distant points on the map.

Q. Now, how many deeds or instruments appeared in the abstract that you obtained?

A. Too many to count at the moment, but there are about 30 or 40 pages, and each page has 50 or 60 entries on it. Those are not all deeds, however. That is the entries on the abstract.

Q. Do you know how many deeds there are? Roughly, the percentage of it?

(Testimony of Stanley E. Goode, Jr.)

A. It is a very small percentage of the total on the abstract. I am not prepared to state what the percentage is.

Q. The document that you have in your hand is what was furnished you by the Title Company, is that correct?

A. That is correct.

Q. How many deeds did you select for examination?

A. Out of this entire group, I believe—well, let's guess at 40. That is approximately right.

Q. Now, you testified that you also considered offers and listings. Where did you obtain that information?

A. Offerings.

Q. Offerings and listings?

A. Some of the information was furnished to me in written form from—through John Cotton's office from the broker [1319] who had the listing; actually, it is the written listing itself. In another instance or two he furnished information from his office.

Q. Those were on matters then which had not been consummated? It was an offer to sell or an offer to purchase, but there had been no actual transaction based upon whatever price was quoted?

A. That is correct.

Q. Now, I notice on Exhibit DD the green circles L-11 to L-29 are upon a line which ends in two arrows pointing off the map. Now, what does that indicate?

A. That indicates that those leases are off the

(Testimony of Stanley E. Goode, Jr.)

map in that direction, that the map does not cover the area on which they are located.

Q. Are those leases on property within Camp Pendleton?

A. Yes, they are. All of the leases within L-11 to -29, inclusive, are within the confines of Camp Pendleton.

Q. And how far does Camp Pendleton extend in that direction?

A. To the Orange County boundary; the south city limits of San Clemente.

Q. What is that distance?

A. I think it is about 20 miles. I am not certain.

Q. Now, I noticed the same situation apparently exists with relation to L-2 in the green circle, and with 30 and 16 [1320] in the red circles.

A. Those are data items at considerable distance from the Sutro property. They are off the map. The same prevails as to items 14 and 17 on the right side of Exhibit DD.

Q. Yes. Now, on the map, the closest lease which you apparently considered is L-1; is that correct?

A. L-30.

Q. Yes, L-30, and L-9, and L-1; is that correct?

A. I think that is correct as to the indications on the map, yes.

Q. And L-30 is property owned by Mr. Zahn-hiser?

A. That's correct.

Q. And L-9 is within the boundaries of Camp Pendleton?

A. That's right.

(Testimony of Stanley E. Goode, Jr.)

Q. How far did you say that the Pankey ranch was from Mr. Sutro's property?

A. I don't recall what I stated.

Q. I believe you said it was five miles

A. I just said—I believe I said I would guess whatever the figure was, and I don't recall what it was. It is more than five miles.

Q. How much is it, as shown on that map?

A. It would be about 10 miles.

Q. And that map—that is a scale map, incidentally, is it not? [1321]

A. Yes, it is a U.S.G.S. scale map.

Q. And how far does the map indicate the distance from Mr. Sutro's property is to Vista?

A. Five or six miles. About six miles, or five, in that vicinity.

Q. And how far is it to Oceanside?

A. It would be seven miles; six to seven miles.

Q. It is less than that, isn't it?

The Court: Step down, if you want to.

(The witness does as suggested.)

The Witness: Five miles.

Q. (By Mr. Cranston): Do you know where Delphy Corners is?

The Court: What is that point?

Mr. Cranston: Delphy Corners.

The Witness: I am not familiar with it by that name.

Q. By Mr. Cranston: Or the other property, which is known as the Delphy Hill land?

(Testimony of Stanley E. Goode, Jr.)

Mr. Abbott: Can we have a little description of the property, counsel?

Mr. Cranston: I don't happen to have a little description here. It is property which I can indicate on the map. I am asking the witness if he is familiar with it.

Mr. Abbott: Well, it hardly seems fair to ask the witness about some common name. If he gives the full name of the owner [1322] of the ranch, that would be some indication.

Mr. Cranston: Very well.

Q. (By Mr. Cranston): Do you know the property of Jack Delphy?

A. There is some property—the man or the corporation owns more than one property, as I understand it, and I don't know if we are referring to the same one, but I do have knowledge of one 180-acre parcel. It is located east of the Pendleton-Fallbrook Road.

Q. And is that shown on your map?

A. That is L-1 on the map.

Q. That is not the property concerning which I was inquiring. By the way, is the Williams ranch that you appraised that you referred to in your qualifications, was that Orville Williams' ranch?

A. Richard Williams.

Q. Richard Williams? A. Yes.

Q. Was that formerly in a part of the Hampton Ranch?

A. He has assembled that from several trans-

(Testimony of Stanley E. Goode, Jr.)

actions, but I don't recall the names of the grantors in those transactions.

Q. Now, you have testified, Mr. Goode, that in your opinion there is a ratio between sales price and rental value. Does the ratio between the sales price and the rental value [1323] vary, at least to some extent, with the sales price when the land is being considered as agricultural land?

A. May I have the question again, please?

(Question read.)

A. There is a variation under differing conditions, if that is what you are referring to.

Q. That is, land might have a high value because of its particular location, which would make it advantageous for residence property, might it not, and the rental value would not be reflected in the increase in the sales price?

A. That is absolutely right. You couldn't apply it to different categories of land, other than a given agricultural neighborhood or district.

Q. Well, even within a given agricultural area, land might have one market value because of its peculiar adaptability for one feature, and the rental value would not bear the same relationship to that price as the rental value and the sales price of other land in that area?

A. Well, if there is any superimposition of a higher use, such as residential, then the percentage is distorted, just as it is in Orange County and Los Angeles County at the present time on all

(Testimony of Stanley E. Goode, Jr.)

agricultural lands in that neighborhood. So it has to be confined to the neighborhood in question.

Q. Now, you testified that you had found no instance of recorded leases in the transcript from the Title Company. [1324]

A. That is right.

Q. Now, I notice, according to the map, that there seem to be no indications where the same property was both leased and sold, as shown on Exhibit DD; is that correct?

A. The rentals and sales—the comparable rentals are indicated in green, and do not necessarily tie to the sale which is located in the same vicinity. The tie-in between the two is not indicated there on the map, but I do have information on properties which were both leased and sold.

Q. Well, any information you have on that is not reflected on the map even in having a green and a red circle connected together?

A. They are not connected. They were not drawn that way.

Q. I thought that the circles were supposed to represent the location of the property?

A. That is the general location of the property, that is correct.

Q. Are there any—

A. The general area of the valley. There was no attempt to draw on that map the perimeter of the property, and locate it with exactness. [1325]

Q. Well, for example, No. 25 on the map is located in the approximate area of the property which is referred to by that number, is it not?

(Testimony of Stanley E. Goode, Jr.)

A. Yes.

Q. And there is no lease number anywhere near to that? A. That is correct.

Q. Now, the same would be true of L-1? That is not the same property as 20?

A. That's right.

Q. Or 19?

A. Well, I would have to look to see. I do not believe so.

Q. In other words, the dots do not overlap?

A. No.

Q. Well, can you state any instances in which you have information as to rental value and as to sales value of the same piece of property?

A. L-3, -4, and -5, and sale 33 are within the range of valuation dates in question. I have information on——

Q. Those properties are lying to the east of Highway 395; is that correct?

A. Both sides of Highway 395.

Q. The leases are indicated on the east, and the sale on the west?

A. Well, that ranch contained 4,180 acres, and for that [1326] reason, if you drew it in, it would include the area that all of those are located in.

Q. Well, the leases would affect the entire area that was sold? A. No.

Q. Then the lease was merely a portion of the area sold? A. That's right.

Q. So that it would involve a question of interpretation as to the relative value of the part leased

(Testimony of Stanley E. Goode, Jr.)

to the whole? A. That's correct.

Q. Now, is there any other area where you have any information concerning the rental value and the sale value of any particular piece of property?

A. On sale No. 7, I have information as to the rental on that property.

Q. Is there any other instance where you have information on the sale and rental of the same property?

A. On sale No. 11, on one offering that is not shown on the map.

Q. Is that property which is outside the area contained within the map?

A. It is within the map, but was recently obtained, and since the map was prepared. And on lease No. 6.

Q. Is that a part of the Pankey ranch?

A. No, it isn't. [1327]

Q. There is no sale indicated on that?

A. There was one sale consummated, but I had an indication of value by the willingness of the owner to sell at a given price. And on No. 7.

Q. You have already referred to that, I believe?

A. Oh, I beg your pardon. And No. 10.

Q. That is sale 7 and lease 10?

A. No, it is an indication of value in connection with lease 10.

Mr. Cranston: Yes. That is, sale 7 and lease 10 are the same, I believe. That was the first instance which you gave where you did have the same properties.

(Testimony of Stanley E. Goode, Jr.)

The Court: He gave 7, 11, 6, and 10, according to my record. Is that right, Mr. Goode?

The Witness: I think Mr. Cranston is in error as to the relationship between 10 and 7. That is sale 7 and lease 10——

Mr. Cranston: Are the same property?

The Witness: No, they are not.

Q. (By Mr. Cranston): Then there is no connection between sale 7 and any lease?

A. On sale 7, I have information as to what that property was leased for.

Q. And is that the lease——

A. By it is not indicated on the map. In other words——

Q. Is that indicated by lease 10? [1328]

A. No, it is not. It is not indicated on the map by any number.

Q. Well, do you have any indication as to the sale price of the property shown by lease 10?

A. I beg your pardon, Mr. Cranston. You are correct. That is, the property that sold at sale No. 7 was rented—I have rental information under item 10.

Q. Then if I understand you correctly, you have information on the sale and rental of one piece of property, which is sale 7 and lease 10; you have information on the property shown as sale 11, on the property shown as lease 6, on a piece which you have not shown on the map, and then as to sale 33 you have information as to a lease of a

(Testimony of Stanley E. Goode, Jr.)

part of it, and those are the only instances in which you have information as to sales and rentals affecting the same property?

A. That's right, I believe.

Q. Then your generalization as to the ratio between sales and rentals is in essence based upon three cases?

A. Not entirely, no.

Q. In so far as this valley is concerned?

A. Not entirely, no.

Q. And whatever general background you have had?

A. And the general comparison, with 30 sales for comparison purposes, I was able to get a good idea of the value of the properties that were leased anywhere where I examined [1329] them.

Q. But you don't know of any lease on those properties?

A. That is not where it became a mathematical question of computing out the ratio of a sale and lease on the same identical property. It is limited to what you have mentioned here.

Q. Yes. Now, leases L-11 to L-29, and L-9, or, in other words, that would make twenty of the leases referred to, are all within Camp Pendleton?

A. That is correct.

Q. Now, did you obtain information on those leases in the period from 1946 to 1953?

A. Not for the entire period. They were not available to me on that basis.

Q. What period did they cover?

A. They covered the average that—they gave

(Testimony of Stanley E. Goode, Jr.)

me the average figures of what they had obtained on those for a net period of time.

Q. Did you see the leases?

A. No, I did not.

Q. Do you know what provisions the leases contained?

A. Yes. I discussed at some length with the Eleventh Naval District the terms of those leases.

Q. Didn't those leases contain restrictions on the use of water? [1330]

A. Yes, they did.

Q. What were those restrictions?

A. They varied from lease to lease, but they have a cancellation clause which provides that the Government can take the land at any time without payment for the crop loss, and that the water limitation can be one acre-foot in some instances for the season, and the Government can take possession on 30 days' notice at any time.

Q. And without payment for any crop damage?

A. And without payment for any crop damage.

Q. Isn't it the common practice under those leases in many cases for the tenant to rent three or four acres of land, and only irrigate one acre, putting the total water allotment for, say, three or four acres upon the one acre to grow the crop?

A. They sometimes do that, yes.

Q. That would affect the rental value of the property, would it not?

A. Yes, it would.

Q. And the cancellation clause would affect the rental value of the property?

(Testimony of Stanley E. Goode, Jr.)

A. Yes, and I so considered it.

Q. Now, the rental value of any particular piece of property, in so far as any particular crop is concerned, would depend in part on the water cost, wouldn't it? [1331]

A. Well, first of all, the terms of the lease——

Q. Yes. In each of these cases I assume that the other factors remain constant, that the rental value would depend upon the cost of the water in any particular case on any particular piece of land as to any particular crop.

A. It wouldn't depend on the water cost if the owner was paying it.

Q. If the tenant was paying it?

A. If the tenant was paying it, it would.

Q. And it would also depend in part, would it not, upon the labor cost for distributing the water to the ground?

A. Well, it is pretty hard to answer on a generalization of that type. It could be a factor.

Q. Well, in other words, if you would take, for example, \$10 per acre-foot of labor to put an acre-foot of water on the ground, that would be one factor which would affect the rent——

A. Only——

Q. ——if the same water could be put on at \$5 per acre-foot, the tenant could afford to pay more rent for that piece of property?

A. Assuming that he is doing the economic thing when he does that, and that is the highest and

(Testimony of Stanley E. Goode, Jr.)

best use of the land, and certain other variables, that would be the case, yes.

Q. Now, the rental value would also depend in part, would it not, assuming now that other factors remained the same, [1332] upon whether the system for placing water upon the property was so designed that large quantities of water could be placed upon the property very quickly in the event of hot drying winds or prolonged dry spells; would that not be correct?

A. I think the head of water could have an effect, yes.

Q. And also the availability of stored water?

A. Yes.

Q. Now, in these cases where you have investigated leaseholds, did you in each case investigate the cost of the water upon that particular property?

A. No, sir.

Q. Did you determine what the labor cost would be for distributing the water in each of those cases?

A. No, sir.

Q. Did you determine the pipe sizes and the storage capacities of each system, so as to determine whether large quantities of water could be placed upon the property in times of sudden heat or emergency?

A. I know something of the water facilities on some of these properties, but not to that extent.

Q. Well, without knowing those factors, how was it possible to make an intelligent comparison

(Testimony of Stanley E. Goode, Jr.)

of rental values of one piece of property with another.

A. Well, if you know the distance, just by looking on a contour map, that a man has to raise his water, and you have a [1333] knowledge of water levels at the point where he is taking his water, that in itself gives you an indication of what his water cost is. And by his operations, and by the operations typical in the district, the practical nature of the economics involved is best illustrated. In other words, if a good farmer does it, it is an indication that it is a sound operation.

Q. Well, there is more involved to the matter of water costs, isn't there, than the amount of the lift? Doesn't that depend upon the size of the pump, the number of hours per day the pump is operated, the stand-by charges, and those other items?

A. It depends on a lot more than just that. It depends upon the depreciation schedule in the pipeline and any other equipment that is involved, and the maintenance and repair of it, and so forth. It is quite a study to figure out the exact—it is actually an engineering study to figure out the exact water cost on a given piece of property where there is any sizeable installation.

Q. Now, in considering what the fair market value was for Mr. Sutro's property, did you consider the value of that property with the irrigation system which was in effect when Mr. Sutro purchased it, or did you consider it with an irrigation

(Testimony of Stanley E. Goode, Jr.)

system in effect such as is referred to in the exhibits in this case, with which I believe you are familiar? You have [1334] been in court during the entire case?

A. Yes. Yes, I know the exhibits you are referring to. I considered the property as it was, as it actually existed in 1946, not with the irrigation system which is shown on the exhibits.

Q. Then the opinion you have given does not reflect any valuation or any difference in rental value which would be accomplished by the installation of the system referred to in the exhibits concerning which Mr. Sutro has testified?

A. No, it does not.

Q. You have testified that pre-irrigation has been used in certain areas in California. What factors affect the efficiency or the desirability of pre-irrigation? That is, is pre-irrigation a practice which can be followed equally well in all types of soil under all types of conditions? A. No.

Q. What factors affect the desirability or undesirability of pre-irrigation?

A. Well, in effect, the pre-irrigation of a piece of land is nothing more than providing a guarantee of rainfall by irrigating when the rains don't fall, and other than for that factor of it, the characteristics of desirabilities and undesirabilities of land for dry farming prevails.

Q. Well, in other words, pre-irrigation merely insures that you will have water in the soil at the time the seed is [1335] planted?

(Testimony of Stanley E. Goode, Jr.)

A. That is correct.

Q. It assures nothing as to the presence of water during the time the crop is growing?

A. That's right.

Q. Now, in Mr. Sutro's soil—by the way, I believe you said you took certain soil tests?

A. Yes, I did.

Q. Did you find any Hanford soil?

A. Yes.

Q. Is pre-irrigation effective or desirable in that type of soil?

A. Yes, where circumstances demand it. It is more effective if it is a completely irrigated soil.

Q. Well, isn't Hanford soil of such a type that pre-irrigation would be a hazardous practice?

A. Not in my opinion. There are types of Hanford soils that that would be true on, but any soil classification has its fine textures and its coarse textures.

Q. Well, what type of Hanford soil would you consider Mr. Sutro's soil to be?

A. I believe it was classified as Hanford fine sandy loam.

Q. Would your opinion as to the desirability or effectiveness of pre-irrigation on this soil be affected by the statement [1336] in the pamphlet, "Soil Survey of the Oceanside Area of California, by R. Earl Storie, University of California, in charge, and E. J. Carpenter, of the United States Department of Agriculture," a bulletin published by the United States Department of Agriculture in

(Testimony of Stanley E. Goode, Jr.)

1929, No. 11, to the effect that—this is at page 19:

“Crops often suffer from drought where irrigation is delayed or is not practiced,” in Hanford fine sandy loam?

A. What portion of page 19 are you reading from?

Q. It is the last sentence of the first paragraph under the heading “Hanford Fine Sandy Loam.”

A. Yes, I agree with that statement.

Q. In view of that, would it be a good practice to pre-irrigate, which would mean that irrigation would later be prevented or delayed?

A. That does not refer to his statement when he says “Irrigation is delayed.” He is referring to an irrigated crop which has a certain moisture content in the soil, required for it to grow properly, and if you delay it, that soil type is going to drain readily enough so that it is going to wilt the crop, or if irrigation is not practiced, he is referring to dry farming.

I would not question anything that Dr. Storie says, because he is the best soil man in the United States, in my [1337] opinion; but I don't think he is referring to that question in the manner that you are.

Q. Now, what other factors would affect the desirability of pre-irrigation, aside from the character of the soil?

A. Well, your general climate, certainly, your distance from the coast, the amount of moisture in

(Testimony of Stanley E. Goode, Jr.)

the air, and, of course, weather conditions during the growth.

Q. Well, what about the slope of the soil? Would that have any effect?

A. It would have a bearing on it, too.

Q. Then considering this land, did you determine what the specific retention of the soil was?

A. No, I did not. I am not able to make a test of that type.

Q. Well, wouldn't you have to know the specific retention of the soil in order to determine whether it was of a proper character to be a subject of pre-irrigation? A. No.

Q. The specific retention means the amount of water the soil can hold against gravity by molecular attraction, doesn't it?

A. I am not sure of that. State that again, please.

Q. Isn't the specific retention the amount of water which the soil can hold against gravity by molecular attraction? [1338]

A. It sounds correct, but I wouldn't state with certainty. I think it is.

Q. Wouldn't it be essential to determine that before you could determine the effectiveness of pre-irrigation on any particular soil?

A. No, because if you have the soil type over here, and it is raising that many beans, that is a much better indication than any scientific test.

Q. But the question of the retention of the water would depend upon other factors than the type of

(Testimony of Stanley E. Goode, Jr.)

the soil? If the slope and the drainage were different, the climate was different, if the wind conditions were different, wouldn't those factors affect it?

A. They could all affect it. There are a million variables in any farm problem.

Q. And you did not consider those features in your consideration of pre-irrigation in this case?

A. I did not make any tests of that sort.

The Court: We might as well suspend now, gentlemen, until 2:00 o'clock.

(Whereupon, at 12:00 o'clock noon, March 5, 1954, a recess was taken until 2:00 o'clock p.m., of the same date.) [1339]

Friday, March 5, 1954, 2:00 P.M.

STANLEY E. GOODE, JR.

the witness on the stand at the time of recess, resumed the stand and testified further as follows:

Cross-Examination
(Continued)

The Court: Proceed.

By Mr. Cranston:

Q. Mr. Goode, before the recess we had mentioned the leases on the Camp Pendleton property. What is the rental price paid on those Camp Pendleton leases per acre?

A. The first is the Magee lease, involving 1776 acres of land, which is rented on a quarter crop

(Testimony of Stanley E. Goode, Jr.)

share basis for the production of beans, and they raise 12 to 14 sacks of beans per acre per year.

Q. But do you have——

A. And that is the indication of the price for the product, because it is a crop share lease.

Q. Do you have any Pendleton leases which were leased for the growing of irrigated crops?

A. Yes, I have. The Rathwish lease is for \$45 per acre per year for row crops.

Q. Does that contain a limitation on the water usage?

A. Yes, it does. The first lease I gave you was a dry farm lease, the 12 to 14 sacks of beans. Other than that, [1340] you may assume that these all have limited irrigation water unless I specify otherwise.

The Beggs Brothers lease had \$45 per acre, for truck crops. They have a second lease at \$35 per acre.

Contreras leases for \$35 per acre for row crops. Singh pays \$41.20 for row crops.

Frazee pays \$45 per acre for flowers.

Q. How many acres are in that?

A. Forty acres. And also on another 150 acres, the same rate, the same purpose.

Q. And the same tenant?

A. And the same tenant. And also on an additional 40 acres. These, however, are separate leases.

Q. Are they all at that same price?

A. That's right. And there is one agricultural lease between the Government and the State of

(Testimony of Stanley E. Goode, Jr.)

California in connection with a seed potato program, involving 237 acres at \$16 an acre, which is reported.

Beggs Brothers, again, on 36 acres, \$40 per acre cash rent, row crops.

Seventy-two acres, Boehm, \$25 per acre. The same tenant again on 19 acres, \$40 per acre.

These are truck crops, unless I specify otherwise.

Castro, 34 acres, \$35 per acre.

Boehm, again, 29 acres, \$34 per acre cash [1341] rent.

The Spaulding lease is a 20 per cent crop share on barley. I don't have the production on that lease.

Singh, again, on 11 acres, \$45 per acre for row crops. And Singh——

Mr. Weymann: May I have the acreage of that again?

The Witness: Eleven acres. And Singh, again, on 55 acres, at \$45 per acre.

Beggs Brothers, again, on 102 acres, at \$45 per acre.

And that is the extent of the Camp Pendleton leases.

Q. What was the selling price of water in those cases? A. I don't know.

Q. That is added to the rental?

A. That is, I don't have the figures here. They told me—they discussed the water conditions with me at the Eleventh Naval District headquarters, but I don't have the figures. I believe it sold on an inch

(Testimony of Stanley E. Goode, Jr.)

—so much per inch per hour, if I remember correctly, on certain portions of it, but it differs on the varying leases.

Q. But there is an added cost for water, and this price does not include the water?

A. No, it does not.

Q. And these leases contain cancellation clauses?

A. All of them contain cancellation clauses.

Q. Now, how much water would be required for the growth of celery? [1342]

A. I am not prepared to state.

Q. The amount—I will put it this way—you stated, I believe, that the well, or one of the wells, I believe it was Well No. 2, on Mr. Sutro's property, produced 42 inches of water; is that correct?

A. I believe that's right.

Q. If my notes are correct, it is. A. Yes.

Q. And you stated that one inch was the quantity of water required for one acre of land?

A. Well, it depends on the crop, but, generally speaking, among the truck crop farmers in that area, they feel that one inch of water is required for one acre of land for the production of truck crops.

Q. And that was a miner's inch, I suppose, that you are referring to? A. Yes.

Q. Well, now, the amount per acre would depend upon the crop, would it not?

A. Yes, it would, very definitely.

Q. That is, celery, for example, takes considerably more water than many other vegetables?

(Testimony of Stanley E. Goode, Jr.)

A. The duty water on celery might be an additional acre-foot per year. I don't know. I am not prepared to state. [1343]

Q. Do you know what the water requirements are for any specific truck vegetable?

A. I have a whole publication on that in my office, but I don't have it with me, and I can't state what the duty of water is on the individual truck crops.

Q. In making your computations of rental values, then, did you consider the amount of water which would be required on the crops grown upon each parcel, and the availability or lack of availability of water sufficient to grow that crop?

A. May I have the question again?

(Question read.)

A. Where found, yes.

Q. Well, if you don't know how much water is required for a specific crop, how could you have considered that factor?

A. Well, the quickest way to get that information, when there is a time limitation on studies, is to ask the man who is farming it, and ask him what his water requirements are.

Q. But you don't know what the water requirements are in any of these particular cases that you have referred to?

A. Of the lease information on the map?

Q. Yes. A. Oh, yes, I do.

Q. What is the water requirement, for instance,

(Testimony of Stanley E. Goode, Jr.)

for [1344] the crops that are grown on the Singh ranch that you first referred to?

A. Oh, for a single crop?

Q. For a single crop.

A. I can't state with exactness on a single crop. However, I can state this, that on the Pendleton leases that I considered that every one of them was short of water, every one that I have indicated, except these dry farm leases, which, of course, had no water.

Q. Yes?

A. And I considered them in that light. But I also considered the fact that on these lands they were raising flowers, and truck crops, celery, cabbage, tomatoes, and the same general variety of truck crops that I discussed that the subject property was adaptable to, but under conditions at variance with the general market.

Q. And was all of each leased area being irrigated?

A. No.

Q. That is, a portion of the leased area would be irrigated and the balance would not be?

A. That is up to the owner, to spread the water as far as he cares to do so.

Q. As far as he wants to take a chance?

A. That's right.

Q. And it is true that celery cannot be grown with [1345] one acre-foot of water per year, is it not?

(Testimony of Stanley E. Goode, Jr.)

A. I would doubt it. I don't think you could grow celery on one acre-foot.

Q. Doesn't it take two and one-half acre-feet for a crop of celery?

A. By a crop—well, I couldn't state with certainty on that. It sounds about right to me, that it would take two to three acre-feet of water for one season, but I can't state from my own knowledge that that is the fact.

Q. Now, you discussed in your testimony the soil chart which you had made, and which is Exhibit EE, and also discussed the possibility of dry farming certain areas. I call your attention to the exhibit, and, in particular, to a small area marked 3.75, near the corner in the upper portion; to another small area near the right part of the page, with the notation 2.5; to another near the bottom of the page, marked 3.5; to another to the left of that, marked 2.3; to another marked 1.3; and ask if it is economically feasible to engage in dry farming on such small and widely separated parcels of property.

A. It is certainly not desirable, but rather than let the land lay completely idle under a program where it isn't being used on a cattle operation, that is about the best use that can be made of it.

Q. You testified that in considering the rental value [1346] of the Sutro property, you considered the fact that the fields or the areas were irregular in shape. Isn't it a fact that it is the size of the

(Testimony of Stanley E. Goode, Jr.)

field more than the shape which determines whether it is feasible to irrigate it or cultivate it?

A. Well, the shape has a bearing upon it also. The size, of course, is extremely important; the most important of the factors.

Q. In other words, an area of 100 acres with an irregular outline would be far more suitable for cultivation than a perfectly rectangular area of maybe one acre——

A. Well——

Q. ——for commercial purposes?

A. It could well be.

Q. Did you consider, in determining the rental value of this property, the relationship between the ordinary length of a row crop of irrigated vegetables, and the size or sizes of the fields adaptable for such use in the instant case?

A. May I have the question again, please?

(Question read.)

A. You are referring to irrigation runs rather than length of the crop? That is what you meant, the irrigation runs?

Q. The irrigation runs, yes. [1347]

A. I didn't make any layout of irrigation runs on the property, no.

Q. Now, returning to the amount of water required for an acre of land, in addition to varying with the crop, that would also vary with the type of soil, would it not?

A. Yes, it would.

Q. And with the efficiency of the distribution system?

(Testimony of Stanley E. Goode, Jr.)

A. Yes, and with the type of distribution system.

Q. Yes, that is, a distribution system through ditches or through temporary surface pipe?

A. Or sprinklers. It would vary.

Q. Yes. There would not be the same efficiency through those systems as, say, through a concrete or steel pipe system?

A. On the contrary, your water saving would be most under a sprinkler system.

Q. But it would not be under a ditch system or surface pipe?

A. Not open ditch as against enclosed pipe, but, naturally, there would be some loss along the way.

Q. Now, you stated that you considered, among other things, possible flood hazards, and referred to some possibility of a 20-year flood?

A. That's right.

Q. Now, if my memory is correct, there was a flood in [1348] California in the year 1916; is that correct?

A. Yes.

Q. And there was another flood in——

A. I can't testify to that of my own knowledge, obviously, but I understand there was one.

Q. Well, I did happen to be here at that time. And there was another one about 1936 and 1937?

A. '38, I believe.

Q. Yes, within that area. Then on the so-called 20-year flood cycle, the next flood year which could reasonably be anticipated would be somewhere along '56, '57, '58; is that correct?

(Testimony of Stanley E. Goode, Jr.)

A. That is without the scope of my activities, to predict when that is going to come.

Q. If you were predicting floods on a 20-year cycle, that is when the next flood would come, would it not?

A. The flood is not predicted on a cycle basis. It is predicted on the basis of odds, one out of twenty that it is going to be next year. I believe that is the import of the calculations, the engineering calculations on it. In other words, the Flood Control engineer that made these calculations did not say that we are going to have a flood a certain year, but that based on rainfall statistics available that it happens that every 20 years you will get this much rainfall in one year out of that 20, based on the best odds they can [1349] calculate.

Q. To go back again—this is beyond my own personal observation, but I believe the record will establish the fact, will it not, that the year 1895 and '96 was a very wet year in California. Are you familiar with that?

A. In 1887, I believe, was the big flood year, if I recall it correctly, and possibly that is the same flood to which you are referring, that is statistically used for the designing of flood control dams in Southern California.

Q. I think it was in the year 1895——

A. Whatever the year——

Q. ——but it was in the latter part of the Nineteenth Century? A. That is correct.

Q. Did you take into consideration the fact that a prudent man, purchasing property in 1946, with

(Testimony of Stanley E. Goode, Jr.)

that background as to the history of 20-year floods, for whatever that history may show, would have considered the advisability of proceeding on the assumption that there would be a period of some 10 years before another flood of that type could be expected, or did you consider that factor at all?

A. I considered that the man who would be purchasing the property at that time would become aware of the flood hazard and the odds of a flood taking place on the property through his investigation, and that from that he would reach [1350] his own conclusion, whatever it might be, as to whether or not to improve the property, and would consider that in a design of any sort and in any calculations which he might make as to amounts to be spent on the property.

Q. By the way, when were your investigations made on this property? A. Exact dates?

Q. Yes, please.

A. I was on the property first on February 1st of this year, and I was on the—I beg your pardon. On February 9th.

Q. That was the first time you were on this property? A. That's correct.

Mr. Abbott: Your Honor, we want to avoid any inference that the Government may have misled the Court. On the hearing in late January we testified that an appraiser was ready to appear in this cause, and he was, but it was not this appraiser. It was a man by the name of John Cotton, whose report is in our hands now.

(Testimony of Stanley E. Goode, Jr.)

Q. (By Mr. Cranston): And when else were you on there?

A. February 16th; February 22nd. Those were the times that I have been on the property, on those dates.

Q. And when was it that the pictures that are in evidence were taken?

A. On the 22nd of February, I believe. I beg your [1351] pardon. I took some of them on February 9th, and some on February 22nd.

Q. Now, was it on those same days that you interviewed the various witnesses as to whom you testified?

A. No, not restricted to these same days. That is, I did some interviewing these same days, and also did interviewing on other days. These were the days that I was on the subject property.

Q. I see. When did you see Miss Whelan, if you have any record of that?

A. February 22nd.

Q. And when did you see Mr. McDaniel?

A. I never did see Mr. McDaniel. I talked to him over the telephone, and talked to Mrs. McDaniel. I talked to Mr. McDaniel over the telephone twice. He was not available.

Q. I had understood from your testimony yesterday that you saw him.

A. I may have stated that I saw him in error. I talked to Mr. McDaniel, but I didn't actually see him. He is ill, you know.

Q. Well, I am not personally acquainted with him.

(Testimony of Stanley E. Goode, Jr.)

A. Well, he is not available for appointment.

Q. Now, did you see the Pankeys in that same time?

A. No, I didn't. That was the 17th of February, Bob and Ed Pankey both. [1352]

Q. Now, you did not at any time, however, see Mr. Jack Delphy? A. I did not.

Q. And you are not familiar with the rental which he is paying or receiving from his property?

A. On one of his properties I am, but I didn't get the information from Mr. Delphy.

Q. Now, would your opinion in any way be changed if you knew that Mr. Delphy had 100 acres of property in the valley rented in 1949 and 1950 for \$100 an acre?

A. It wouldn't change my opinion.

Q. Would it change your opinion if you knew that on hill land, with a water lift of over 350 feet, with the tenant paying all the pumping charges, Mr. Delphy rented land in 1951 and 1952 for \$90 per acre? A. It wouldn't change my opinion.

Q. Would it change your opinion if you knew that Mr. Joe Alvarado in 1949 and 1950 refused \$125 an acre for 30 acres of his land, because he wished to farm it himself?

A. I know nothing about that information, and I wouldn't change my opinion because of that.

Q. That would not change your opinion as to the rental of the land in the San Luis Rey Valley?

A. No. The offer to do so wasn't apparently consummated. [1353]

(Testimony of Stanley E. Goode, Jr.)

Q. Well, the landlord refused to accept it on the ground it was too small. The tenant offered it and the landlord would not accept it.

The Court: Is there a question now?

Q. (By Mr. Cranston): My question was: Would that affect your opinion? A. No.

Q. Would it affect your opinion to know that Mr. Joe Galegos paid Mr. John Katzenbach \$100 an acre for land near Mr. Sutro's in the years 1948, 1949 and 1950? A. No.

Q. Would it change your opinion to know that Mr. Ambrose DeBard rented land in the Fallbrook area at \$60 per acre, plus a charge of \$32.50 per acre-foot for water? A. No.

Q. Mr. Goode, in your opinion, what is the most valuable crop which can be grown as a truck product on truck land? Is celery the most valuable crop, or some other crop?

A. By most valuable, do you mean you are referring to the retail product per acre?

Q. The most productive to the grower.

A. In net profit or in gross?

Q. In the net profit.

A. I couldn't state. That depends on the season, and the skill of the manager, and many other [1354] things.

Q. Isn't it generally recognized that celery is the most profitable crop?

A. It is one of the very profitable crops, that is true, in the years when the celery price is right.

(Testimony of Stanley E. Goode, Jr.)

Q. Now, you referred in your testimony to the hazards of frost. Isn't it true that the mesa land, which you have indicated is 25.8 acres of Mr. Sutro's property, would be particularly frost-free land because of its elevation?

A. It is my opinion that it is not frost-free.

Q. Relatively speaking to the other land in the San Luis Rey area, is that not frost-free?

A. No.

Q. Of less subject to frost than the lower lands further down in the valley?

A. Well, when you qualify it with the lower lands, as to elevation, I would say that it is less apt to be frozen than the lower flat ground, and that would apply not only to the lower ground of the Sutro ranch, but the lower elevation of land in the San Luis Rey Valley.

Q. I would suppose that no land in Southern California is entirely frost-free?

A. That is an opinion which I share with you.

Q. 1913, and a few other years possibly demonstrated that.

Q. Now, you stated that the property in the present [1355] case, even with polluted water could have been used for growing corn for silage, and sugar-beets. Is that the highest and most productive use to which the land could be put if the water supply were not polluted?

A. Those crops could be grown on the property under either instance. In other words, on most agriculturral lands you don't pick out one crop and

(Testimony of Stanley E. Goode, Jr.)

raise that same crop year after year after year. You vary your crops, and those crops could have been used as rotation crops, with a definite agricultural purpose in mind at some point along the line, or they could have been raised under either polluted or unpolluted water for the same purposes.

Q. If the water were unpolluted, they would definitely not be the highest and best crops which could be raised upon the land?

A. That would depend again on the price of sugar-beets, for example, and the demand for those crops. You cannot state with certainty on agricultural land that a defined crop is going to be the crop that represents the highest and best use of that land, on a long-term basis, because there are many variables involved.

I don't think that silage corn on that represents the optimum use. I think that there is a very small chance that that would be grown if the water were unpolluted. And you had the variety of other crops which I previously mentioned [1356] to choose from. I think that is one crop that probably would not be selected if you had unpolluted water.

Q. You have also referred to the growing of vegetables for seeds upon this property. Are there areas in this vicinity where vegetables are grown for seed purposes, to your knowledge?

A. Well, an attempt was made, or, rather, a request for a lease was made on the Sutro property for that purpose previous to Mr. Sutro's ownership, for seed crop.

(Testimony of Stanley E. Goode, Jr.)

Q. Do you know of any areas where vegetables have been grown for seeds?

A. I am not familiar with seed crops generally. I know that they are occasionally grown, predominantly in the Oxnard-Ventura district. They do raise seed crops there. But I am not familiar with the extent to which they are grown in San Diego County.

Q. I see. Isn't it a fact that the vegetables that are grown for seed are raised farther north than San Diego County, and generally in regions which are more inland than the Sutro property?

A. Well, the seed crops I saw in Ventura were closer to the ocean than these.

Q. But you know of no such areas in San Diego County where vegetables are grown for seed?

A. I can't think of one. [1357]

Q. Now, with reference to the growing of flowers on this property, how much would be involved—what would be the expense for installing a sprinkler system for flowers? Did you compute that cost?

A. You could use a portable sprinkling system.

Q. What would be the expense of a portable sprinkling system? Did you compute that?

A. I didn't compute that cost.

Q. Did you compute the cost of installing a pump either in the creek or in the well?

A. I didn't compute the actual cost, no.

Q. When you referred to the fact that a prudent man would consider the desirability of lifting the water in Pilgrim Creek five to ten feet, and then ir-

(Testimony of Stanley E. Goode, Jr.)

rigating the bottom lands, did you consider the fact that the natural flow would not be rapid enough to be applied to the land economically, unless some diversion and storage facilities were established, so that the water might be stored and then placed upon the land in larger quantities?

A. I don't think that is true, Mr. Cranston.

Q. What allowance did you make for the flow of the creek, then?

A. I believe I testified this morning as to the flow in inches that was coming down the creek.

Q. You testified, I believe, to 30 inches. [1358]

A. Plus the 80 inches of water that was being dumped into the creek.

Q. Yes, but the natural flow, without the 80 inches.

A. Oh, you are talking about the natural flow?

Q. Yes.

A. Well, I assumed if the natural flow was captured and pumped to that extent, that it could be done in the same manner that Mr. Ikemi had previously done.

Q. But you did not consider whether such a method was economically feasible and efficient?

A. Oh, it is very definitely economical.

Q. To capture the 30 inches alone?

A. Yes.

Q. How many acre-feet per day is that?

A. Let me see.

Q. Well, if this is going to be a long computation, I don't want to take the time of the Court.

(Testimony of Stanley E. Goode, Jr.)

A. It is a mathematical computation. It isn't a long computation, but the formula slips my mind. That is what I am researching here for.

Q. In any event, you had not made that calculation?

A. I have made a lot of calculations on this water, but I can't recall to mind at the moment.

Q. Well, to return to the question of the flowers, Mr. Goode. [1359]

Mr. Abbott: Let's let the witness answer the question that has been put to him.

The Court: He started in, so I guess we had better let him finish.

The Witness: That was 30 inches?

Q. (By Mr. Cranston): Yes.

A. Fifteen acre-feet in 24 hours I believe is correct. You requested an answer in acre-feet, did you not?

Q. Yes. Would that be 15 acre-feet in 24 hours? A. I believe that is correct.

Q. Then if your previous computations were correct that 30 inches of water would be sufficient for irrigating 30 acres of land, that would be placing half an acre-foot of water on each acre of land every day. My understanding of the testimony this morning was that one inch of water was the amount required for one acre of land.

A. If—now, let me see if I can express it in a different way. I have a conversion table in here somewhere, if I can find it, and it will give me the answers without any computations.

(Testimony of Stanley E. Goode, Jr.)

Sixteen acres is the amount of—I beg your pardon. You asked for acre-feet?

Q. Yes, the number of acre-feet.

A. Sixteen acre-inches. That is why I was giving you the wrong answer. [1360]

Mr. Cranston: I thought you had Pilgrim Creek into quite a stream.

The Court: That was the inflationary period.

The Witness: That is correct, your Honor.

Q. (By Mr. Cranston): That would be then 1.4 or 1.5 acre-feet per day? A. That's right.

Q. That would be somewhat less than 400 gallons a minute, would it not?

A. Well, if we are dealing with an 80-inch stream to start with——

Q. Yes.

A. ——that should be 720 gallons per minute.

Q. I am talking about the 30 inches, which was the natural flow of the stream.

A. That would be 270 gallons per minute.

Q. 270 gallons per minute. An irrigator in a day can handle far more than 270 gallons per minute, can he not?

A. Well, that will depend upon the system that he is using. That is generally true.

Q. An irrigator can handle up to 1750 or 1800 gallons, can he not?

A. Well, it depends upon the crop, and the layout, and a good many things. In the San Joaquin Valley one irrigator can handle a section of land up there. [1361]

(Testimony of Stanley E. Goode, Jr.)

Q. In other words, the natural flow of Pilgrim Creek would be a relatively small flow, unless it were stored and then placed upon the land in larger quantities, would it not?

A. Not too small to use. Not too small to be well adapted to use on a sprinkler system.

Q. Now, the sprinkler system would require the installation of equipment in order to put the water under pressure, would it not?

A. You can pump against a sprinkler system by dropping a siphon in the creek.

Q. Yes, but you said you had not computed the cost of such a system?

A. No. It is a portable system. There wasn't anything of that nature installed that was a part of the realty during this period of time.

Q. Now, do you know of any areas near Mr. Sutro's property, which are being rented for the growth of flowers, where the area involved is equal to the irrigable land in the Sutro property?

A. Yes, I believe I mentioned a lease or two in here on Camp Pendleton. One of them was over 100 acres, I believe.

Q. But that was subject to the restriction on the use of water, and presumably not all of it was actually placed to flowers, if I recall your testimony.

A. That's right. It may have been a reduction from [1362] 100 acres, but I think it would be substantially the greater part of it.

Q. Now, flower growing is quite a specialty, isn't it?

(Testimony of Stanley E. Goode, Jr.)

A. I think it would be classed as a specialty, along with any truck crop is a specialty.

Q. Well, flower growing is subject to more hazards really than a vegetable truck crop, is it not?

A. I don't know.

Q. Now, you referred to factors which might have been considered by a prudent man, and you said that he might have considered converting the ranch to a cattle ranch or a dairy; is that correct?

A. That's right.

Q. Well, under what conditions could the ranch have been converted to a dairy with a polluted water supply?

A. Not with the dairy operation on the ranch itself, but by feeding dairy cattle on pasturing, that is, cows that were not being milked actually. But every dairy has a considerable area of land that it uses besides the actual land surrounding the dairy itself.

I should not say every one. There are all types, and closer here to the city it is more apt to be located on a 20-acre parcel, but generally they require acreage in excess of their dairy layout itself.

Q. Did you consider the cost which would be involved [1363] in such a conversion program?

A. There wouldn't be any cost involved in the conversion to a beef feeding operation, which it would in effect be, or feeding dairy cattle instead. It would be a matter of planting pasture, like you would plant any crop.

(Testimony of Stanley E. Goode, Jr.)

Q. And what about the irrigation of the pasture?

A. It could be done with a portable sprinkling system.

Q. But you say you have not computed the cost of such a system?

A. Well, it is like a tractor. I didn't compute the cost of the tractor either.

Q. So you have not computed, in any event, what cost would be involved in distributing the water under any of the systems which you have proposed?

A. The actual cost in so much per acre-foot? Is that what you are referring to?

Q. Yes.

A. No, I haven't engineered a specific water system on that property.

Q. Did you compute what the cost would be to drain or reclaim the alkali land which you enclosed in the pinkish border in your exhibit?

A. Not in details of so much for pipe, and so much for labor, and that sort of thing, no.

Q. That is, you do not know what the total cost would [1364] be, or any of the ingredients of that cost?

A. I have a pretty good idea of what it would cost based on similar installations on other properties on a per acre installation cost basis.

Q. But you did not compute it in this case?

A. Not other than on a per acre cost.

Q. Now, I believe that you testified that one

(Testimony of Stanley E. Goode, Jr.)

thing which you might have considered, or that you believed a prudent man would consider would be to irrigate the 56 acres of flat bottom land, and the 25.8 acres of mesa land, and to use the 18 acres which had been alkaline and the balance for pasture in grazing without constructing any fences; is that correct?

A. That is correct. And may I explain my answer?

Q. Yes, would you do that, please?

A. During periods of time when these lands were not planted to a crop that is destructible by the cattle—in other words, periodically the land is going to be tilled and there will be nothing on it in the way of a growing crop, the cattle can be turned into that entire ranch without the construction of any fences at any point, and the forage value that lies in the dry pasture and that alkali wet pasture area could be taken advantage of in that manner, but it would not be practical to attempt to fence off these areas, because the cost of the fence to go around these pasture [1365] areas would exceed the value of the land that they would enclose.

Q. That would depend upon how long the fence was to stand, would it not? Or do you mean to say that the cost of the fence to surround the area would exceed the total value of the land, the value of the fee interest in the land?

A. The pasture land, that is right, if you ran an irregular fence around this entire area.

Q. What, in your opinion, would be the cost of

(Testimony of Stanley E. Goode, Jr.)

such an irregular fence? Did you compute that cost?

A. I had no specifications, but I think your minimum fence would cost you probably 20 cents a foot. That is a minimum fence.

Q. And in your opinion, the pasture land is not worth placing that fence around it?

A. That's right.

Q. But isn't it true that the best procedure for use of the pasture land is to rotate the use, that is, to have whatever animals are in the pasture moved from field to field periodically, and not to leave them in the same area continuously?

A. If you are talking about a 500 or a 1000 cow spread, that would be the case, but not on a ranch of this type.

Q. But to make the most efficient use of it as pasture [1366] land, would that not be required?

A. I don't see how that would become a factor in the operation of this property, unless you were converting the whole ranch into an irrigating pasture operation, wherein you might put some fencing in in connection with that.

Q. That would be the way to make an efficient use of it as pasture land?

A. If the entire ranch were being converted to irrigated pasture.

Q. To return to the question of the pre-irrigation of crops, the pre-irrigation is no insurance against lack of rainfall after the seed has been planted; is that correct? A. That's correct.

(Testimony of Stanley E. Goode, Jr.)

Q. What would be the gross income per acre if this property were diverted to pasture land? Did you compute that?

A. It would depend upon the type of operation. First of all, if it were an owner-managed pasture, he would rent on the basis of probably \$1 per 100 pounds of animal per month, and if he had two 500-pound critters on it, say, 1000 pounds of animal on there each month, that would be a rent commensurate with \$10 per month, and if it was an 8 months season, it would be \$80 a year rent which he would collect on the amount of land which those critters could graze on, and that on pasture of the best type that would be grown on the subject property in the flat would be approximately one acre of [1367] ground, so that his gross income for the use of that pasture during a period of one year or season, there having to be a rest season in the winter, would be about \$80, out of which, of course, he would have to pay his own expenses in connection with the irrigation and management of the pasture.

That is one method by which he could realize a rental, an absolute net rental to himself, I think, in the neighborhood of \$40 an acre. And if he didn't care to do that, he could turn around and actually rent the land itself to another party doing the same thing that he would be doing under those circumstances, or possibly running his own cattle on there for his own profit, who would pay him the sum of \$40 per acre cash rent for that purpose.

(Testimony of Stanley E. Goode, Jr.)

Q. Do you know of any leases in that area for pasturage purposes of \$40 cash rent?

A. Yes, I do.

Q. How far away?

A. Right up the San Luis Rey River Valley. I can't tell you the exact distance. Jack Carrillo has a 7-year pasture lease on the Cameron property at \$40 per acre per year cash rental.

Q. Where is that property?

A. It is Item 34 on the map. I beg your pardon. Item 8.

Q. That is up above the—— [1368]

A. That is at Bonsall.

Q. At Bonsall. And that is irrigated pasture?

A. That is. The tenant put in his own pasture, and is paying his own water costs, and has all the——

Q. How many acres are involved in that?

A. I don't have the acreage on this sheet, but I believe it is 180, or thereabouts, if I remember correctly.

Q. That is in bottom land; is that correct?

A. A portion of it is, and a portion of it is hill land.

Q. Do you know of any others in that area?

A. That is the only cash pasture rental that I know of. But I do know of pasture lands—that is, cash rental on irrigated pasture. But I know of pasture lands where the owner manages the pasture, and also dry pasture.

Q. Now, in making your computations and con-

(Testimony of Stanley E. Goode, Jr.)

sidering what should be done, did you take into consideration the fact that in 1946 apparently no one knew, at least Mr. Sutro did not know, how long the condition would remain; in other words, that from time to time, as set forth in the transcript at the earlier hearing, which you stated you had read, there were numerous promises from the Navy that conditions would be changed. In other words, is your opinion based upon our present knowledge that the condition would prevail over a period of time, or is it based upon the idea that the condition [1369] was momentarily expected to cease?

A. I thought I had testified pretty thoroughly on that point, as to the uncertainties that I considered in connection with this property, and the various effects that it had on the property, and there was no hindsight involved in any of my calculations.

Q. Do you consider Miss Whelan, to whom I believe you spoke, an experienced operator?

A. I have never met Miss Whelan except on that one day, and talked to her there. Judging from what she told me, I would say that she had been in business a long time. I know nothing further than that about her.

Q. Do you know anything of Mr. McDaniel's operations?

A. Only that he has owned and operated extensive lands in the area, but that's all.

Q. For a considerable period of time?

A. I believe he has been there for a number of years.

(Testimony of Stanley E. Goode, Jr.)

Q. And so has Miss Whelan? A. Yes.

Q. If Miss Whelan and Mr. McDaniel were unable to make any large amounts on the Sutro property during the period in question, what leads you to believe that anyone else would have paid \$40 per acre for the property for pasture purposes?

A. If that land produced the amount of alfalfa that Miss Whelan told me she grew on it, it would amount to more [1370] rent than I have put on it.

Q. But in view of the returns which are here in evidence, what is the justification for that belief?

A. I haven't the returns, to my own satisfaction. I sat here in the courtroom, and I heard things here and there said about the amount of income, and about it was this year or that year that it was paid in, but I couldn't assemble from that information an accurate study of what the income was.

Q. You have no information that would lead you to believe that Miss Whelan or Mr. McDaniel were not experienced operators, have you?

A. Not at all.

Q. Would the conduct of Mr. Sutro in leasing the property to them appear to you, therefore, to be the conduct of a prudent man?

A. I have no idea of his leasing negotiations with them.

Q. Did you consider any course which might have been evolved which would be any more prudent than to lease to two operators such as Miss Whelan and Mr. McDaniel?

A. Are you asking me to give you a reading on

(Testimony of Stanley E. Goode, Jr.)

those two tenants, as such? Is that the idea? I am not familiar [1371] enough with them to answer that question.

Mr. Cranston: That is all.

Redirect Examination

By Mr. Weymann:

Q. Mr. Goode, you were asked concerning the investigation of the rentals paid on the Pendleton leases. Did you use those leases in arriving at the rental value of the subject property as polluted?

A. Yes.

Q. Did you use those rentals paid at Pendleton in arriving at your estimate of the rental value of the subject property unpolluted? A. No.

Q. In your valuation did you assume that there was any difference in the acreage which could be irrigated, as between the use of polluted and unpolluted water?

A. The acreage under irrigation would be the same in either instance, with the exception that if the operator chose to dry farm, or, to pre-irrigate portions of it, it would be in the form of a pre-irrigation rather than a complete irrigation, but the same number of acres would be irrigated under either circumstance of polluted water or unpolluted water.

Q. That the same crops could be grown, except those which were garden truck and edible vegetables?

A. Those which I mentioned, yes, sir. [1372]

(Testimony of Stanley E. Goode, Jr.)

Q. Those which you mentioned. Now, where the tenant of a farm pays the water bill, would the availability of 80 inches of water from Pilgrim Creek be a benefit to the user, regardless of whether it was polluted or not?

A. Very definitely; as long as it was referring to crops which could be grown on that property with polluted water, the additional gift of 80 inches of water in Pilgrim Creek, which could be merely lifted out of the creek and distributed over that flat land in sufficient quantity to practically gravitate to that 80 acres, would be very definitely a consideration that a tenant would take into mind and would make it a more desirable property for him to rent.

Q. And that 80 acres was in addition to the natural flow of Pilgrim Creek?

A. The 80 inches was in addition to the natural flow, yes, sir.

Q. The 80 inches. Now, reference was made to the possibility of the use of a portable irrigation system. Do you know if in such instances the tenant customarily furnishes the portable irrigation system?

A. In many instances the tenant furnishes the portable irrigation system.

Q. You were asked about the Pankey leases. Did you have any information, or secure any information, as to the availability of water on those properties? [1373]

A. I stood by the wells when they were running, and looked at the drawdown gauge, and I know

(Testimony of Stanley E. Goode, Jr.)

what their pumping levels were. I have previously computed the water cost on the ranch, and I discussed with Mr. Pankey the engineering report which he just recently received on the water costs on that property.

Q. And, incidentally, that is one of the properties which you have previously appraised, is it not?

A. That is correct.

Q. You were asked about pre-irrigation and the question of rainfall. Is any rainfall required on pre-irrigated beans, for example? A. No, sir.

Q. That is all. Oh, one more question, Mr. Goode.

How does the cost of putting water on the land effect the diminution in market value?

A. May I have the question again, please?

(Question read.)

The Court: That isn't a very clear question to me.

The Witness: It isn't to me either, your Honor.

Mr. Weymann: I will withdraw that question, then.

Q. (By Mr. Weymann): How does the cost of putting the water on the land effect the diminution in the rental value of the land?

A. I think—I believe I know what you are referring [1374] to there. There was no—because the extra flow of 80 inches of additional water in Pilgrim Creek was there at a very low cost, a lower cost than any other water on the property, I didn't correspondingly alter my estimate of the fair rental value. If I had, my estimate of the rental loss

(Testimony of Stanley E. Goode, Jr.)

would have been less than \$10,000, instead of the figure of \$10,000.

Mr. Weymann: I think that is all.

Recross-Examination

By Mr. Cranston:

Q. Mr. Goode, are you aware of the fact that both Miss Whelan and Mr. McDaniel, at the time they leased this property, owned portable irrigation systems?

A. I had no knowledge of that, whether they had portable irrigation systems or not.

Q. You did not know that they did not deem it advisable to install the system?

A. I question it.

Q. You stated that where the tenant pays for the water, the availability of additional water would be a benefit, even though the water was not polluted. By that do you mean it necessarily follows that two acre-feet of polluted water will produce a more profitable crop than one acre-foot of unpolluted water?

A. I don't follow the question.

May I have that again, please, with a little bit ahead [1375] of it there, please?

(Question read.)

Mr. Cranston: The question contains a "not" that should not have been in the question. The question should be "even though the water was polluted."

The Court: I think you had better reframe the question.

(Testimony of Stanley E. Goode, Jr.)

Mr. Cranston: Yes, I had better rephrase the question.

Q. (By Mr. Cranston): You stated that where the tenant paid the water, the availability of additional water would be of benefit to him, even though the water was polluted. My question is: Does that mean that, say, two acre-feet of polluted water, in your opinion, will produce crops which are worth more than one acre-foot of unpolluted water?

A. The polluted water would be a very definite advantage in case the man was using it for a crop which was permitted under the health laws to be grown there. He would rather have two acre-feet of polluted water than he would one acre-foot of pure water, or unpolluted water, I will state, that is, if he were growing alfalfa, or pasture, or sugar-beets, or these other crops that I have previously mentioned.

Q. But if the available supply of unpolluted water, without the addition of the polluted water, was sufficient to irrigate the property, then that condition which you have referred to would not prevail; isn't that correct?

A. I think my rental estimates themselves explain my [1376] position on that. If I didn't feel that way, I would not have any rental loss at all on the subject property.

Q. In other words, if the available supply of unpolluted water is sufficient, adding the addition of polluted water is a detriment rather than a benefit?

(Testimony of Stanley E. Goode, Jr.)

A. Let me have that a little slower, please.

The Court: The reporter will read it.

The Witness: A detriment, according to my figures.

Mr. Cranston: That is all.

Mr. Weymann: That is all. May Mr. Goode be excused?

The Court: Yes.

(Witness excused.) [1377]

Mr. Abbott: Mr. Vaughan.

JOHN L. VAUGHAN, JR.

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name, please?

The Witness: John L. Vaughn, Jr.

The Clerk: V-a-u-g-h-n?

The Witness: V-a-u-g-h-a-n.

The Court: I think we will take our recess now for a few minutes.

(A short recess.)

The Court: Proceed.

Direct Examination

By Mr. Abbott:

Q. What is your name, sir?

A. John L. Vaughan, Jr.

Q. Where is your residence, Mr. Vaughan?

A. Los Angeles.

(Testimony of John L. Vaughan, Jr.)

Q. What is your profession?

A. I am a valuation engineer and appraiser.

Q. By whom are you employed?

A. Marshall & Stevens, of Los Angeles, California.

Q. What is your educational background, Mr. Vaughan?

A. I studied electrical engineering at the University [1378] of Virginia, and I took some Service school courses during my period in the Service; studied property valuation at the University of California. I am a registered professional engineer in the State of California.

Q. Will you state your experience in the professional field in which you are now employed?

A. Yes, sir. Prior to the war I was a valuation engineer with the American Gas & Electric Service Corporation, New York City, involving principally utility valuations. Then I was in the Air Force for approximately 41 months. Immediately after being released from the Service, I came to Los Angeles as engineer in charge for the eleven western states of all work done for the consulting engineering firm of S. W. Marshall, Jr., of Dallas, Texas.

I remained in that capacity for approximately a year and a half, and then I was with Henry Babcock, consulting engineer of Los Angeles for approximately a year, and in the spring of 1948 I took my present position with Marshall & Stevens, in charge of the special appraisal department, and have been in that capacity ever since.

(Testimony of John L. Vaughan, Jr.)

Q. Calling your attention in particular to the year 1946, were you engaged in appraising construction costs at that time? A. Yes, sir, I was.

Q. In what area? [1379]

A. Throughout Southern California.

Q. Did you in the year 1946 appraise construction costs in the vicinity of Oceanside, California?

A. I appraised—in the year 1950 I made an appraisal retroactive of construction costs in the San Juan Capistrano area, and in the general vicinity down there.

Q. And does that general area include the area in which the Sutro ranch is situated?

A. It is in the general area, yes. [1380]

Q. Is Marshall & Stevens a nationwide firm?

A. Yes, sir. They have offices all over the United States and Canada. They are also publishers of the Marshall Valuation Service, the Stevens Valuation Quarterly, and the Residential Evaluator, which are national publications.

Q. Do they compile statistical data relative to construction costs? A. Yes, sir.

Q. And is that statistical data published in any national publication?

A. It is reviewed and incorporated in the Engineering News Record, in the Annual Construction Cost issue, both on the Marshall & Stevens cost trends, and on the Marshall & Stevens equipment, machinery and equipment cost indices.

Q. Will you state, briefly, what recent experiences you have had in the appraising of replacement costs of improvements to real property?

(Testimony of John L. Vaughan, Jr.)

A. Yes, sir. It included such diversified properties as the Subway Terminal Building in Los Angeles, the May Company properties, the Broadway department stores; and getting into machinery and equipment, has included the Grand Central Aircraft Company, McCullough Motors, Harvey Machine Works; into water works it has included the San Juan Capistrano Water Company, the La-Habra Heights Water Company; that is primarily in construction, and numerous other smaller [1381] appraisals, machine shops, and various other smaller businesses such as that.

Q. Have you recently had an assignment with respect to a replacement cost appraisal of the San Juan Capistrano Water Works?

A. Yes, sir, I did a complete study on that; in fact, two different appraisals for submission to the Corporation Commission, one of which was a replacement cost new as of 1951, and the other was an analysis of prior construction costs of the company, for the purpose of bringing them up to date, and to present other data on them, which was an analysis of all of the costs from 1920 to 1951.

Q. I note some difficulty in catching your testimony. If you would slow down just a little bit, Mr. Vaughan, it might be convenient for all of the people who are attempting to note what your statements are. Did the project last described involve use of statistical data to reconstruct construction costs in prior years? A. Yes, sir, it did.

Q. Have you been asked to appraise the difference in construction costs of certain properties de-

(Testimony of John L. Vaughan, Jr.)

scribed in exhibits in evidence in this cause, as between the first half of 1946 and the month of July, 1952?

A. Yes, sir, I have.

Q. What steps did you take in the preparation of that [1382] appraisal?

A. I first examined those exhibits which were available, to get an idea of the scope of the work. I then paid a visit to the subject property for the purpose of inspection and examination of terrain. I was accompanied on that trip by one of our junior engineers, who made a survey. I had interviews in the Oceanside area, attempting to get data relative to construction costs in the two periods, labor costs, material costs, and so on, for the purpose of comparing with our construction cost trends. I also reviewed an appraisal, I believe prepared by Mr. Cotton, which incorporated considerable data on the material and labor costs in the area in the periods in question.

With the assistance of other personnel in the office, I made, as far as possible, a take-off of the quantities involved in the irrigation system and then the buildings under consideration.

After the appraisal that was prepared by the American Appraisal Company was introduced in evidence, I reviewed that, and found that the quantities were apparently in considerably more detail, and considerably more accurate than we had been able to obtain from the sketchy information available to us. For that reason I relied, so far as quantities and descriptions of the intended construction

(Testimony of John L. Vaughan, Jr.)

was concerned, I relied rather heavily on the data contained in that appraisal. [1383]

Q. Well, do the exhibits in this cause contain sufficient data for you, without further data, to prepare the cost analysis which you have prepared?

A. Yes, sir; that is, within reasonable limits of accuracy.

Q. If that is the case, to what extent were you assisted in preparing your estimate by the data reported by the American Appraisal Company?

A. Particularly, insofar as the dams and irrigation system was concerned, in that the exhibit showed that there was a dam planned.

Well, you could scale the approximate length of the dam, but there was additional information which was incorporated in the America Appraisal Company's report, which I don't think was available from the exhibits, at least not to the best of my knowledge, and there was some additional detail on the piping, and the lengths of it, which apparently were taken off in considerable detail by the American Appraisal Company.

On the assumptions as to quality of materials, and actual materials in the buildings, other than the residence proposed on the property, apparently the American had more access to more information than was contained in the exhibits available to me.

Those were the main items on which I relied on their figures. [1384]

Q. Well, all of the exhibits in this cause were made available to you, were they not?

(Testimony of John L. Vaughan, Jr.)

A. That's correct, yes, sir.

Q. Were you assisted in preparing your opinion by any statistical indices or statistical data in the possession of your office? A. Yes, sir.

Q. Will you describe, briefly, what that information so used consisted of?

A. I have charts which come from the Marshall Valuation Service, and schedules of replacement costs for various years for construction and for equipment; one of them headed "The cost indices for the years 1946 to 1953," covering all types of equipment, and detailed comparative replacement cost multipliers for the period 1926 through 1954, as prepared by our research department.

I compared those with the local data which we had been able to get in Oceanside, with the local data secured by Mr. Cotton, and found them all in very close agreement, and used these indices for the purpose of converting my 1952 cost estimates back to the 1946 date.

Q. Now, did that statistical data available to you, representing as you testified actual construction costs, automatically include premium payments to labor during the period which it covers? [1385]

A. Well, it would include all such overtime costs as normally went into construction in that period.

Now when you speak of premium, we refer to premium costs as such things as happened during war years, as black market, and money paid on the side, and things like that, which did not go into the face value of the contracts.

(Testimony of John L. Vaughan, Jr.)

Q. Well, you have answered the question as I should have phrased it. I should have used "overtime" instead of premium.

A. So, inasmuch as our trends, to the best of my knowledge and belief, are based on actual contracts and construction costs of completed projects, I think that our trends do reflect all such normal costs as overtime, which was customarily being paid in the period under consideration.

Q. If in lieu of using the indices and data you have described, one used a straight time labor rate scale, would he secure a different opinion?

A. In all probability, yes, sir.

Q. And would the difference in reconstruction costs, as between July of 1952 and the first half of 1946, be more or less as a result of using a straight time labor index?

A. The difference would be greater, because it would give an indicated cost—a lower indicated cost in 1946.

Q. Now, sir, I will ask you structure by structure what the 1946 first half costs of the structures in question [1386] were, what the 1952 July costs were, and what the difference between those two figures is.

First, with respect to the ranch house, what in your opinion was the 1946 replacement cost?

A. \$23,973.

Q. What was the July, 1952, replacement cost?

A. \$39,462.

(Testimony of John L. Vaughan, Jr.)

Q. What was the difference between those figures? A. \$15,489.

Q. With respect to the repair show, what was the 1946 replacement cost? A. \$7,983.

Q. What was the 1952 replacement cost? A. \$13,140.

Q. And the difference? A. \$5,157.

Q. With respect to the guest house, what was the 1946 cost? A. \$2,592.

Q. What was the 1952 cost? A. \$4,267.

Q. And what was the difference between those two figures? A. \$1,675.

Q. With respect to the implement shed, what was the [1387] 1946 cost? A. \$2,007.

Q. And the 1952 cost? A. \$3,304.

Q. And the difference? A. \$1,297.

Q. With respect to the help house, what was the 1946 cost? A. \$4,650.

Q. And the 1952 cost? A. \$7,654.

Q. And the difference between the last two figures? A. \$3,004.

Q. With respect to the storage shed, what was the 1946 cost? A. \$3,776.

Q. And the 1952 cost? A. \$6,215.

Q. And the difference? A. \$2,439.

Q. With respect to the sewage disposal system, what was the 1946 cost? A. \$1,650.

Q. What was the 1952 cost?

A. \$2,750. [1388]

Q. And the difference was how much?

A. \$1,100.

(Testimony of John L. Vaughan, Jr.)

Q. With respect to the domestic water supply system, what was the 1946 cost? A. \$3,993.

Q. What was the 1952 cost? A. \$6,572.

Q. And the difference? A. \$2,579.

Q. With respect to the irrigation system, did you follow the division between 1946 installations and 1952 installations which was followed by the American Appraisal Company?

A. Yes, sir, I did.

Q. Now, what was the combined 1946 and 1952 price or cost following that division?

A. \$37,016.

Q. What was the 1952 replacement cost?

A. \$56,651.

Q. What was the difference? A. \$19,625.

Q. With respect to the machinery and equipment listed under that head in the American Appraisal report, what was the 1946 new cost?

A. \$25,195. [1389]

Q. What was the 1952 new cost?

A. \$34,297.

Q. And what is the difference?

A. \$9,102.

Mr. Cranston: Could you give me those last figures again, please?

The Witness: The 1946 replacement cost on machinery and equipment, \$25,105; 1952, \$34,297; and the excess cost, the difference between them, \$9,102.

Q. (By Mr. Abbott): By machinery and equipment, you are speaking, are you not, of the items

(Testimony of John L. Vaughan, Jr.)

listed under the complete head of shop machinery and equipment?

A. Yes, sir, that is correct.

Q. On the American Appraisal report?

A. Would you like the totals on that, sir?

Q. Oh, I don't think they will be required. Have you an opinion as to why the figures reported by you differ from those reported by American Appraisal?

A. I believe that the 1952 replacement cost figures, as established by my report and by American's, are not too different. I don't remember the exact figures. I think the major difference is in the 1946 figures, which there, again, in my opinion, are based on the methods used in trending those 1952 costs back to 1946.

As I have testified, I used our average cost trends to [1390] get those factors back—costs back to 1946 on an over-all average basis, particularly for the buildings, based on the statistical data of our research department on actual costs, and, as I understood from the testimony given prior, the other was based on a combination of labor rates and material costs, without any particular consideration given to the amount of overtime customarily paid in contracts in the period in question.

The Court: May I ask a question there?

Mr. Abbott: Certainly, your Honor.

The Court: Mr. Vaughan, did you give the aggregate of the six buildings, the cost of reproduction in 1946? I don't believe you did.

(Testimony of John L. Vaughan, Jr.)

The Witness: No, sir, but I have it right here.

The Court: Will you give that, please?

The Witness: The total buildings, the aggregate of the six buildings for 1946, \$44,981; for 1952, \$74,042; the difference, \$29,061.

The Court: Were you present in court when the appraiser from the American Appraisal Company testified here?

The Witness: Yes, sir.

The Court: Your estimate on the six buildings, the aggregate for the six buildings in 1946, reproduction cost, is more than his, isn't it?

The Witness: I believe so. I don't remember that exact [1391] figure, sir. Yes, I believe I do have a note of it here. \$43,000, roughly, yes, sir.

The Court: And on July 1, 1952, your estimate is a little higher than his?

The Witness: A little less.

The Court: Is it a little less?

The Witness: Yes, sir.

The Court: What is yours?

The Witness: \$74,000, roughly.

The Court: And what do you have his as being?

The Witness: As \$77,000, I believe. Wasn't it?

The Court: That is right.

The Witness: I may explain in a little more detail just how I arrived at that.

The Court: Very well.

The Witness: As I say, the information available to us from the sketches—none of these buildings had been built, with the exception of the re-

(Testimony of John L. Vaughan, Jr.)

pair shop building, which, at the time I inspected it, was in the process of construction and was substantially completed, but on the other buildings the only complete detailed specifications available I saw were on the ranch house. The others gave an elevation and a floor plan, which gave the general characteristics of the building. So in arriving at these replacement costs, we do have in our Stevens Valuation Service typical building [1392-3] costs by districts on a square foot basis, and that is what I used, because it has been my past experience that from the preliminary specifications buildings are usually changed somewhat, and to attempt to arrive at an estimate of what some building which has not yet been built will cost, if you get down to too fine a point, you defeat your own purpose, because there will be minor changes in construction. So I based it on the average cost per square foot of building a building essentially similar to that one.

Q. (By Mr. Abbott): Is the fact that your 1946 total figure is slightly more than the American Appraisal figure attributable to using a substantially lower reconstruction figure in the year 1952?

A. Yes, because my 1946 costs are based directly on the trend from the 1952 costs. In other words, to arrive at the 1952 costs I applied a trend—to arrive at the 1946 costs I applied a trend factor to the 1952 costs directly.

Q. Now, if you had started with the Marshall

(Testimony of John L. Vaughan, Jr.)

& Stevens reproduction costs for 1952, and had accepted that, would you have reached the same, or a higher, or a lower difference?

A. You said Marshall and Stevens. I believe you meant——

Q. I mean American Appraisal, yes.

A. I would have arrived at higher replacement costs in 1946, if I had used their 1952 and our reconstruction cost [1394] trends.

Q. Now, you testified to having visited the subject property, Mr. Vaughn. Will you describe, briefly, what buildings you saw, either completed on the property, or in some state of completion, or under construction?

A. The only one was a small—it looked like a temporary dwelling there, which I didn't more than glance at, and there was a repair shop, the building which is identified as the repair shop, having a gross area of some 2,920 square feet, exclusive of the mezzanine, and including the proposed implement shed attached, which was not being built, I understand, certainly not under construction now. That is the only building I observed on it.

Q. Now, did you inspect the type of floor which the shop had?

A. I looked at that very generally. The shop showed the types of floor in the specifications and in the plans in the exhibits.

Q. Two of the items of equipment described by plaintiff as being items which he proposed to

(Testimony of John L. Vaughan, Jr.)

buy are a Browne & Sharp Milling Machine No.

2—— A. Yes, sir.

Q. ——and a 16-inch shaper?

A. Yes, sir.

Q. Are you familiar with the specifications for [1395] installation of those items of equipment?

A. I have considerable detail on the Browne & Sharp No. 2. I know generally the 16-inch Cincinnati shaper. I don't have the exact weight on that.

Q. What are the specifications for that Browne & Sharp machine?

A. Well, it has a gross weight of 4400 pounds. It has a base of five feet seven inches by seven feet five inches, which gives a loading of 110 pounds per square foot, the surface on which it is mounted, and that is the dead weight loading.

Q. What sort of a mounting or foundation is required for that type of equipment?

A. That would take a concrete—either a concrete slab or mat, or heavy piers with anchor bolts, to have that machine operating.

Q. Did you see any such base upon the plan for the machine shop? A. No, sir.

Q. Did you see any such base in fact installed?

A. No, sir.

Q. What type of base is required, if you know, for the 16-inch Cincinnati shaper?

A. It would take a concrete foundation, with anchor bolts. [1396]

I might explain that I had not seen this machine and equipment list at the time I inspected the prop-

(Testimony of John L. Vaughan, Jr.)

erty, so that I did not specifically examine the building to determine whether those foundations were in, but I don't recall seeing them on the plans, and I don't recall seeing them in the building. I did not specifically examine it.

Q. Now, can you compare the shop equipment listed in the exhibits in evidence here, generally, in terms—can you compare it with the equipment generally possessed by a metropolitan machine shop? A. Well, it would take a——

Mr. Cranston: If the court please, do you wish to go into this inquiry as to a comparison with a metropolitan machine shop?

Mr. Abbott: I have just two questions on this subject, your Honor, one of which has already been put to the witness. It is not going to be a protracted inquiry.

The Court: I don't want to go into it too far, because it will lead us into the same maze that I spoke of before, and prolong the case unnecessarily. You say you have only two questions?

Mr. Abbott: The one now pending is preliminary, and I have one further question on this.

The Court: Very well. Overruled. I didn't know if that was an objection or just an [1397] observation.

Mr. Cranston: It is merely an observation.

The Court: I think it is a good one, but we will permit the two questions.

The Witness: Would you please repeat the question? I lost it.

(Testimony of John L. Vaughan, Jr.)

(Question read.)

The Witness: I have appraised many production machine shops in the course of my appraisal experience, and I found it takes a sizable shop operation to support this quantity of machinery and equipment, particularly, a Browne & Sharp No. 2, and a Cincinnati 16-inch shaper.

Q. (By Mr. Abbott): Now, what gross volume dollarwise of business would be required to economically warrant the expenditure of the capital sums required to buy the shop equipment in question?

Mr. Cranston: I will object to this as leading into realms of speculation that are immaterial in this case.

The Court: Will you read the question, please?

(Question read.)

The Court: I do not believe we want to explore that much further. I am afraid that will defeat our purpose here in trying to get this case to the point of decision, which should be within reasonable limits. I am not speaking of you. I am speaking of the scope that would have to be given as to this witness on cross-examination. Objection [1398] sustained.

Mr. Abbott: I would like to make a very brief offer of proof on this point, your Honor.

The Government offers to prove by the witness now on the stand that it would not be economically feasible to invest the sums required to purchase

(Testimony of John L. Vaughan, Jr.)

the machinery and equipment listed in the American Appraisal Report under the head "Shop Machinery and Equipment" for any commercial venture, unless the gross income of that commercial venture attributable to the operation of the machinery exceeded \$20,000 per year.

The Court: The ruling has been made and the offer will be disallowed.

Q. (By Mr. Abbott): Mr. Vaughan, have you consulted any studies relative to the costs of installation of irrigation systems in terms of dollars per acre to be irrigated?

A. Yes, sir. I have seen some general figures on that, averages.

Q. Have you computed the per acre cost of installation of the particular system evidenced by drawings introduced in this cause?

Mr. Cranston: If the court please, the same objection. We are now getting off into a comparison which is not pertinent to this case.

The Court: There were figures given on that, I think. May I see that exhibit, Mr. Clerk, the report of the American Appraisal Company? [1399]

(The document was handed to the court.)

The Court: Now, will you read the question again, please?

(Question read.)

The Court: I will overrule that objection.

The Witness: Yes, sir, I have.

(Testimony of John L. Vaughan, Jr.)

Q. (By Mr. Abbott): And what is the figure so computed?

A. They said on the 147 acres, which I believe is the best estimate on the actual irrigated, potentially irrigated land, it would be \$385 per acre.

Q. And if the amount of irrigable land was a smaller amount, the per acre cost would increase?

A. That's correct, sir.

Q. Now, will you state what is the figure evidenced by the studies which you have seen relative to the economically feasible investment in irrigation systems in terms of dollars per acre?

Mr. Cranston: If the court please, I will object to that as too general. What system might be economically feasible for the growing of one crop could be economically unfeasible for the growing of another crop, whether it was truck garden, alfalfa, beans, or whatever it was. I don't think there is any one answer that could be given.

Mr. Abbott: I will ask the witness to answer, your Honor, in terms of range. There is an established range, [1400] with a minimum and maximum.

The Court: That would cover all types of crops?

Mr. Abbott: Yes, your Honor.

The Court: I didn't know that. If that is the case, the objection is overruled.

The Witness: May I amplify my reply just a little? These studies I have seen were not what is economically feasible, but what actual costs have been in the past, within a range.

(Testimony of John L. Vaughan, Jr.)

Q. (By Mr. Abbott): Will you give that data, please, giving the maximum and minimum figures?

A. The range is terrific, in that the minimum has been \$30 per acre, and the maximum figures I saw of \$250 per acre.

Q. Do those figures include the cost of drilling wells, and the cost of installing pumps on the wells?

A. Wells and pumps, yes, sir.

Q. Which figures were not included in the \$375 figure you have given for the cost of the irrigation system contemplated by the plaintiff?

A. They were not included.

The Court: \$385?

The Witness: \$385. They were not included.

Q. (By Mr. Abbott): Have you made any inquiry into the cost of chlorination of systems for the purification of [1401] water for domestic use?

A. Yes, sir.

Q. Do you have any figures relative to the cost of a single domestic unit for family use?

A. Yes, sir, I do.

Q. Will you first describe the general operating specifications of the equipment, the cost of which you have in your possession?

A. The particular——

Mr. Cranston: If the court please, I will object to this as not material to the issues presented to the court.

The Court: Overruled.

The Witness: There is one known under the trade name of Proportioneer Midget, which is a

(Testimony of John L. Vaughan, Jr.)

trade name, and is sold locally, and has been on the market since prior to 1946.

It was designed specifically for domestic use, and is used for farm water systems. It is attached to the pump outlet, and operates only when the pump is operating.

Mr. Cranston: If the court please, may I object further on the ground that there is no showing of the qualifications of this witness to testify and to express an opinion as to whether this system is efficient, satisfactory, or whether it will perform the purpose for which it was designed.

Mr. Abbott: I have asked for a cost figure, your Honor.

The Court: Yes. Overruled. [1402]

The Witness: This chlorinator, which is supposedly, according to the manufacturer and the sales organization, adequate for the average farm family, was at a cost in 1952 of approximately \$300, and was available on the market in 1946 at an installed cost of approximately \$275.

Q. (By Mr. Abbott): Have you similar figures with respect to a larger chlorinator?

A. The San Juan Water Company put in one on their commercial system in San Juan Capistrano in 1946 at a cost of \$903. The 1952 estimated replacement cost, which we established, was \$1,156, and at the time that was put in the San Juan Capistrano was serving 495 domestic customers.

Q. Did that one system, the price of which you have just testified to, that one installation furnish

(Testimony of John L. Vaughan, Jr.)

chlorination for the entire group of 400-odd families?

A. It furnished chlorination for all the water going into the reservoir, which served those domestic customers, yes.

Mr. Abbott: No further questions at this time. This witness has other engagements on Monday and Tuesday of next week, and the Government was hopeful that his testimony could be completed today.

The Court: I will not rush counsel, but I hope he has that in mind also. [1402(a)]

Cross-Examination

By Mr. Cranston:

Q. Mr. Vaughan, where did you obtain the figures which you have used in computing the 1946 costs for shop machinery and equipment?

A. I trended the 1952 estimated costs back to 1946, based on our equipment cost trends for metal working equipment.

Q. Did you check with the actual catalogue prices or with the manufacturers of that machinery to determine what their prices in 1946 were?

A. No, sir, I did not at this time. I did not trend any individual equipment price. I computed or estimated the 1952 replacement cost installed, individually, and applied the factor to the total to get an average cost in 1946.

Q. Was the same factor applied on each cost?

A. It was applied to the total only, which, in effect, would apply to each cost.

(Testimony of John L. Vaughan, Jr.)

Q. So that the same factor was applied regardless of the nature of the subject which you were considering?

A. Not regardless of the nature. The factor is based on the average costs of machinery—of the metal working equipment, which individually may vary very considerably from that trend. That is the reason I applied it on the total rather than on individual items of machinery and equipment.

Q. That factor then includes many types of equipment [1403] also which are not found on this list?

A. That is correct, sir.

Q. And that was the only means used by you, sir, in computing the 1946 costs?

A. That's correct, sir.

Q. Where did you obtain your figures on the 1952 costs of this machinery and equipment?

A. We secured the list, I believe it was Exhibit No. 44-G, and it was priced out, partly by me and partly by men in my office, individually as 1952 costs.

Q. What sources did you use on that? Did you take current 1954 prices and apply the same trend figures to them?

A. No, sir. We still had enough in our files so that I think we got 1952 costs without too much trouble on it.

Q. Did you get the actual 1952 costs on each one of the items set forth in this list?

(Testimony of John L. Vaughan, Jr.)

A. Within reason. As accurately as we could, yes, sir.

Q. You would not say that you got them on each item, though?

A. We priced each item on what we considered to be 1952 prices, based—in some cases we went back to appraisals we made in 1952. We had very limited time on this, and we went back to some appraisals we made in 1952, and other sources in the office, to get those prices.

Q. Now, you said that you were assisted by statistics [1404] in your office consisting of cost indices for 1946 to 1952? A. Yes, sir, to '53.

Q. What are those cost indices?

A. I have them here, sir, if you would like to see them. That is for the equipment, and this is for the construction (handing documents to counsel).

The Witness: Would your Honor like to see them?

The Court: Yes, if you have copies available.

(The documents were handed to the court.)

Q. (By Mr. Cranston): Then I understand that you do not know what the actual cost, say, of this Browne & Sharp milling machine that has been referred to was in 1946?

A. No, sir. As I stated, I applied it only to the total machinery and equipment for that type of machinery and equipment.

Q. And the same would be true of every other item? A. That's correct, sir.

(Testimony of John L. Vaughan, Jr.)

Mr. Abbott: Now, counsel, does that question contemplate each other item of equipment and machinery?

Mr. Cranston: That is all I am discussing at the present time.

Q. (By Mr. Cranston): Now, would overtime have any effect upon the cost of production in 1946, the difference in the figures?

A. The manufacturers' costs, certainly. [1405]

Q. I thought that you had been discussing the overtime in construction industries.

A. I was speaking of it in construction industries. I made no reference to it in manufacturing.

Q. You have assumed though, apparently, that that would carry over into the manufacturing also?

A. Well, our cost indices are based on actual costs in that period, which includes everything that would contribute to the cost in 1946.

Q. Now, you mentioned some other item which you had in your office and which assisted you.

A. I referred to the—one thing I remember referring to was the comparative replacement cost multipliers for construction, and the separate cost indices for equipment.

Q. In other words, the other document that you referred to was this yellow sheet which you have given me?

A. Yes, sir, that's correct.

Q. Now, was that the document which you used in determining your 1946 reproduction costs, then, of the buildings and other items?

A. The equipment was used—the metal work-

(Testimony of John L. Vaughan, Jr.)

ing equipment index was used for the shop machinery and equipment. The construction cost was used for the irrigation system and for the buildings.

Q. That is, on the irrigation system and the buildings [1406] you did consult actual suppliers' figures as to the cost of materials in 1946?

A. Yes, sir, I did.

Q. I thought you stated that you had used this comparative replacement cost multiplier.

A. I consulted—in the limited time available—rather, I did not personally do it, but my assistant did, in this Oceanside area, and I also reviewed Mr. Cotton's analysis, and found them in very close agreement with this trend, and since that was a fact, I then used the trend.

Q. Then the figures are obtained from the trend, and do not reflect actual costs of particular items, as established by you or any of your assistants on any particular item? A. That's correct, sir.

Q. Now, in connection with the cost of irrigation systems per acre, to which you have referred, do those costs include the cost of constructing storage reservoirs or dams?

A. No, sir, normally not.

Q. Those are the costs simply for the distribution system?

A. The distribution system, wells, and pumps.

Q. Now, was the chlorinator to which you have referred, which could have been purchased, you said, for \$300 in 1952, designed to chlorinate sew-

(Testimony of John L. Vaughan, Jr.)

age, and make it available for drinking [1407] purposes?

Mr. Abbott: Hold your answer. We will object, your Honor. That assumes a state of the record which is clearly erroneous. The sewage effluent in Pilgrim Creek was not sewage, and the water in the well showed a very low bacterial count. It can hardly be characterized as sewage. It had no solid matter at all, and a low degree of pollution.

Mr. Cranston: If the court please, I believe the record shows that some of the samples sent to the Board of Health for examination showed concentrations of over one million count.

Mr. Abbott: That was not the house well.

Mr. Cranston: And that the remark was made, why were they sending pure sewage to be tested.

Mr. Abbott: First of all, that was Mr. Sutro's gratuitous interjection in the record, and, secondly, he was referring to the wells in the bed of Pilgrim Creek, and not to the house well.

The Court: Overruled.

The Witness: I am not a chemical engineer or chemist, and I do not consider myself qualified to rule on the proper functioning of a chlorination system. I can only testify as to the costs of one, which was represented by the manufacturer as being adequate for normal use on farm wells.

Q. (By Mr. Cranston): That would be to take care of normal waters, but you do not know whether that would be [1408] adequate or sufficient for water which had been subjected to contamination from sewage effluents?

(Testimony of John L. Vaughan, Jr.)

A. I do not know, no, sir.

Mr. Cranston: That is all.

Mr. Abbott: No further questions, your Honor.

The Court: That is all.

Mr. Abbott: May the witness be excused?

The Court: Yes.

(Witness excused.)

Mr. Abbott: At this time, your Honor, the Government will move to strike the evidence of Mr Tedford relative to the cost of draining the land.

As the court may recall, that evidence was objected to, and the court officially sustained the Government's objection, but on counsel's representation that he wished to make a record, and to excuse Mr. Tedford at the earliest possible date, the court permitted the evidence to be admitted, subject to a later motion to strike. That motion is now being tendered on the ground there has been no proper foundation for the evidence, and that it is irrelevant and immaterial.

Mr. Cranston: Will you please state more specifically what evidence you are referring to?

The Court: That was what I did not have in mind. My mind was on something else, and I do not know if I have a note on that or not. [1409]

Mr. Abbott: Mr. Tedford gave certain evidence relative to the general scope, and certain factors to be considered in determining the cost of draining a part of the Sutro land, and we objected on the ground that there had been no objective evi-

dence of an intention to drain the land, that there were no plans, specifications, or drawings relative to that project, and at that time Mr. Sutro had not testified and had not identified any of the plans and specifications which have subsequently been placed in the record.

The court, therefore, permitted the evidence to come into the record subject to a later motion to strike. The plans and specifications which are now in the record do not embrace the work which was described by Mr. Tedford, and, therefore, we submit the objection originally tendered is still valid.

Mr. Cranston: If the court please, I still do not recall that Mr. Tedford testified to the cost of reclaiming. He testified to the possibility of reclaiming.

Mr. Abbott: I did not state that he testified to costs. I stated that he testified to factors to be considered in determining cost.

The Court: I think the court would have to refresh its recollection by recourse either to the reporter's notes, or to require some transcription of those notes. I do not have any note on that of my own. Probably you can defer that until later, and maybe discuss it in the argument, whether it be [1410] oral or in briefs, if they are to be written.

Mr. Abbott: I might then request that the reporter endeavor to locate that point in the record, perhaps to read the testimony and the objection to the court at the time of argument.

The Government rests, your Honor.

Mr. Cranston: Mr. Sutro.

ADOLPH G. SUTRO

the plaintiff herein, recalled in his own behalf, having been previously duly sworn, testified as follows:

Direct Examination

By Mr. Cranston:

Q. I believe you heard the testimony, Mr. Sutro, of Mr. Vaughan with reference to the milling machine and the shaper. I will ask what your practice has been in connection with foundations for shop machinery and equipment.

A. With that type of floor, we generally spot the machinery around where we want it, to be sure we have it just right.

Then if any of it is too heavy—by the way, when it is spotted, it is usually moved in on rollers. We are not in a position usually to have a shop with a traveling crane of any size, and when it is in the position we want it, we mark the position, move it to one side, cut a hole in the floor, put [1411] in a block of concrete, and move the machine back over it, if the machine is heavy enough to need a concrete support.

Q. In your opinion, does the milling machine in question need a concrete support?

A. It may. Not because it has a floor loading of 100 pounds per square foot because that is a comparatively light load, and I would not worry about that for a moment. It is just a case if there might be some vibration. It is not the loading that would govern whether we would put the milling

(Testimony of Adolph G. Sutro.)

machine on a concrete block. It is if there is any perceptible vibration.

Q. And the shaper?

Mr. Abbott: Your Honor, we will object. The witness has not shown any qualifications for giving testimony of the type called for by the question.

Mr. Cranston: If the court please, I believe the evidence shows that he has maintained the machinery at the Sutro Baths, and he has operated machinery of that type for several years.

Mr. Abbott: I believe when asked if he purchased or had any of the equipment in question, he named a couple of pieces, but he didn't name the shaper or the milling machine.

The Court: I will overrule the objection.

The Witness: May I have the question?

(The question was read.) [1412]

The Witness: The shaper, being a reciprocating machine, I think will probably require a concrete support.

Q. (By Mr. Cranston): Will you install such a support, if necessary?

A. Oh, certainly.

Mr. Cranston: Your Honor, I believe that that will conclude our case on rebuttal. However, before definitely resting, I would like the opportunity to examine my notes more fully. I presume that we will have to adjourn until Monday for the conclusion of the case, and for whatever argument there

(Testimony of Adolph G. Sutro.)

may be, so that I would suggest we adjourn at this time. I don't like to just stall until the end of court.

The Court: With the understanding that the only matter will be for you to have an opportunity for you to review your notes, but not to have conferences with witnesses so as to ascertain whether they want to add anything to the testimony. I think we have got the case pretty well before the court.

Mr. Cranston: I believe it is, your Honor.

Mr. Abbott: We would like an opportunity to cross-examine this witness, your Honor.

The Court: Certainly.

Cross-Examination

By Mr. Abbott:

Q. Have you in fact cut any of these holes in the floor, Mr. Sutro? [1413]

A. No, we haven't—no.

Mr. Abbott: That is all.

The Witness: The floor, Mr. Abbott, is not complete.

The Court: I believe we have this case very well in hand. What is there that requires you to search your notes so as to ascertain whether or not you have finished the examination of witnesses.

Mr. Cranston: Frankly, the only thing I had in mind, your Honor, was to examine more fully the notes on Mr. Goode's testimony, to see if there was anything in that testimony which I wished to

have Mr. Sutro discuss. As I said, I do not believe that there is, but I would like that opportunity.

The Court: We will probably have to meet on Monday, in any event. It may be that the court will desire to take this case on briefs. I am sure it will if the argument proceeds for as long relatively as the evidence has. But there may be some motions, so that, as I say, we will probably have to meet on Monday. That will be with the understanding, however, that even though you have conferences with your client, it will not bring about a repetition of the evidence that is in the record. I think the case has been covered pretty thoroughly.

I want to say now, and I probably will be able to say it a little better on Monday, but I am going to say now that the court appreciates the action of counsel for both sides in [1414] expediting this case so far as it could be expedited properly. It is wholesome to find lawyers co-operating with the court in trying to get a case to the point of decision as early as possible, and if the situation had been at the beginning as it is today, I am sure we would have been able to make a ruling before now in this litigation.

10:00 o'clock Monday morning.

(Whereupon, at 4:20 o'clock p.m., Friday, March 5, 1954, an adjournment was taken until 10:00 o'clock a.m., Monday, March 8, 1954.)

Monday, March 8, 1954, 10:00 A.M.

The Court: Call the case, Mr. Clerk.

The Clerk: Yes, your Honor. Case No. 1183-SD Civil, Adolph G. Sutro v. United States of America, further court trial on the issue of damages.

My record shows that Mr. Abbott and Mr. Weymann are present, and that Mr. Cranston and Mr. Ackerman are absent. Also, that Mr. Sutro is absent.

The Court: The record will show that in a joint conference, telephonic in its nature, but joint, with counsel for the plaintiff and one of counsel for the defendant on last Friday afternoon after the adjournment of court, it appeared, as a result of the telephonic conversation, that the plaintiff and his counsel would further discuss the probability of further proceedings to put in some evidence, or to have some other further proceeding necessitating the presence of plaintiff's counsel, but that, after such conversation, if it was concluded by plaintiff and his counsel that no further offer or motion would be made, unless the court required, they would not be here this morning.

Further inquiry was made by one of the attorneys of the court as to whether the cause would be submitted on oral argument or on briefs, and the trial judge stated that the cause, if and when submitted, would be submitted on written arguments [1417] or briefs.

It now appears, as the clerk has stated, that plaintiff's counsel are not present, nor is plaintiff present. Have I recited about the substance of the conversation, Mr. Abbott?

Mr. Abbott: Yes, your Honor. There was one additional matter discussed, and that was the disposition of the Government's motion to strike certain testimony, and counsel agreed that the court might review the reporter's notes in camera, without the presence of counsel, and rule on that motion.

The Court: Would you specifically state what portion of that motion you are relying on, again?

Mr. Abbott: That was a motion to strike the evidence of Mr. Tedford relative to certain measurements and considerations to be considered in determining the cost of moving earth on the Sutro ranch. An objection was initially tendered to the evidence, and the objection was overruled upon the statement of plaintiff's counsel that the connecting link necessary to establish the materiality and relevancy would be supplied later by evidence of Mr. Sutro.

The Government's motion to strike is predicated upon the failure of the plaintiff to lay a foundation for Mr. Tedford's evidence.

The Court: You might discuss that in your briefs also, I think, Mr. Abbott, and undoubtedly you can have a transcript by the reporter on that phase of the matter, if necessary. [1418]

It is now about eight minutes after ten, and it seems to be apparent that plaintiff is not coming, either personally or with his counsel, and upon that assumption, I think the record is clear.

It may not be clearly recorded, however. The cause is now submitted on the merits, with the

further direction that the argument of the cause on the merits will be upon briefs, the plaintiff to have the opening and closing brief; the opening brief to be filed within 10 days from today, I presume, and the defendant to have 10 days after the service of the opening brief upon the defendant's counsel within which to file his brief, and the closing brief of the plaintiff to be filed within 5 days after the service upon plaintiff's counsel of the defendant's brief. Thereupon the cause will stand submitted for decision.

I believe that covers the situation, gentlemen. Does it?

Mr. Weymann: Yes, sir.

Mr. Abbott: I think it does. We appreciate the court's patience in bearing with what we have felt to be the necessity for interposing perhaps more objections than ordinarily are interposed by the Government. Probably the rather novel characteristics of the case have necessitated that course of conduct on the part of Government counsel.

The Court: I think so, Mr. Abbott. I think I stated in the presence of plaintiff's counsel, and of plaintiff, [1419] the pleasure of the court in trying the case.

Mr. Abbott: Thank you, your Honor.

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 9th day of April, A.D. 1954.

/s/ MARIE G. ZELLNER,
Official Reporter.

[Endorsed]: Filed July 8, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 61, inclusive, contain the original Complaint; Answer; Supplemental Complaint; Amended Answer; Findings of Fact and Conclusions of Law; Second Supplemental Complaint; Answer to Second Supplemental Complaint; Conclusions of the Court; Award and Order for Judgment and Attorneys' Fees; Judgment Awarding

Damages and Allowing Attorneys' Fees; Two Defendant's Notices of Appeal; Plaintiff's Notice of Appeal; Cost Bond on Appeal; Motion for Extension of Time to Docket Appeal; Two Orders Extending Time to Docket Appeal and Two Designations of Record on Appeal which, together with Reporter's Transcript of Proceedings on March 1, 2, 3, 4, 5 and 8, 1954, transmitted herewith, constitute the transcript of record on appeals to the United States Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 22nd day of November, A.D. 1954.

[Seal]

EDMUND L. SMITH,
Clerk.

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 14,588. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Adolph G. Sutro, Appellee; Adolph G. Sutro, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeals from the United States District Court for the Southern District of California, Southern Division.

Filed: November 23, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

C. A. No. 14588

UNITED STATES OF AMERICA,

Appellant and Cross-Appellee,

vs.

ADOLPH G. SUTRO,

Appellee and Cross-Appellant.

STATEMENT OF POINTS UPON WHICH
APPELLANT UNITED STATES OF
AMERICA INTENDS TO RELY ON AP-
PEAL

Appellant United States of America intends to
rely upon the following points on appeal of the
above-entitled cause:

I.

The District Court erred in its award of damages
to appellee Adolph G. Sutro in that the amount
thereof is excessive in view of the damage incurred,
if any.

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MAX F. DEUTZ,
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Chief of Civil Division.

/s/ MARVIN ZINMAN,

Assistant U. S. Attorney, Attorneys for Appellant,
and Cross-Appellee.

[Endorsed]: Filed December 6, 1954.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS UPON WHICH
CROSS-APPELLANT ADOLPH G. SUTRO
INTENDS TO RELY ON APPEAL.

Cross-Appellant Adolph G. Sutro intends to rely upon the following points on his appeal of the above-entitled cause:

I.

The District Court erred in its award of damages to cross-appellant Adolph G. Sutro in that the amount thereof is grossly inadequate in view of the damage incurred.

II.

The District Court erred in the trial of the action on the issue of damages in that it improperly excluded evidence of certain elements of damage, and did not permit cross-appellant Adolph G. Sutro to show the full extent of his injury.

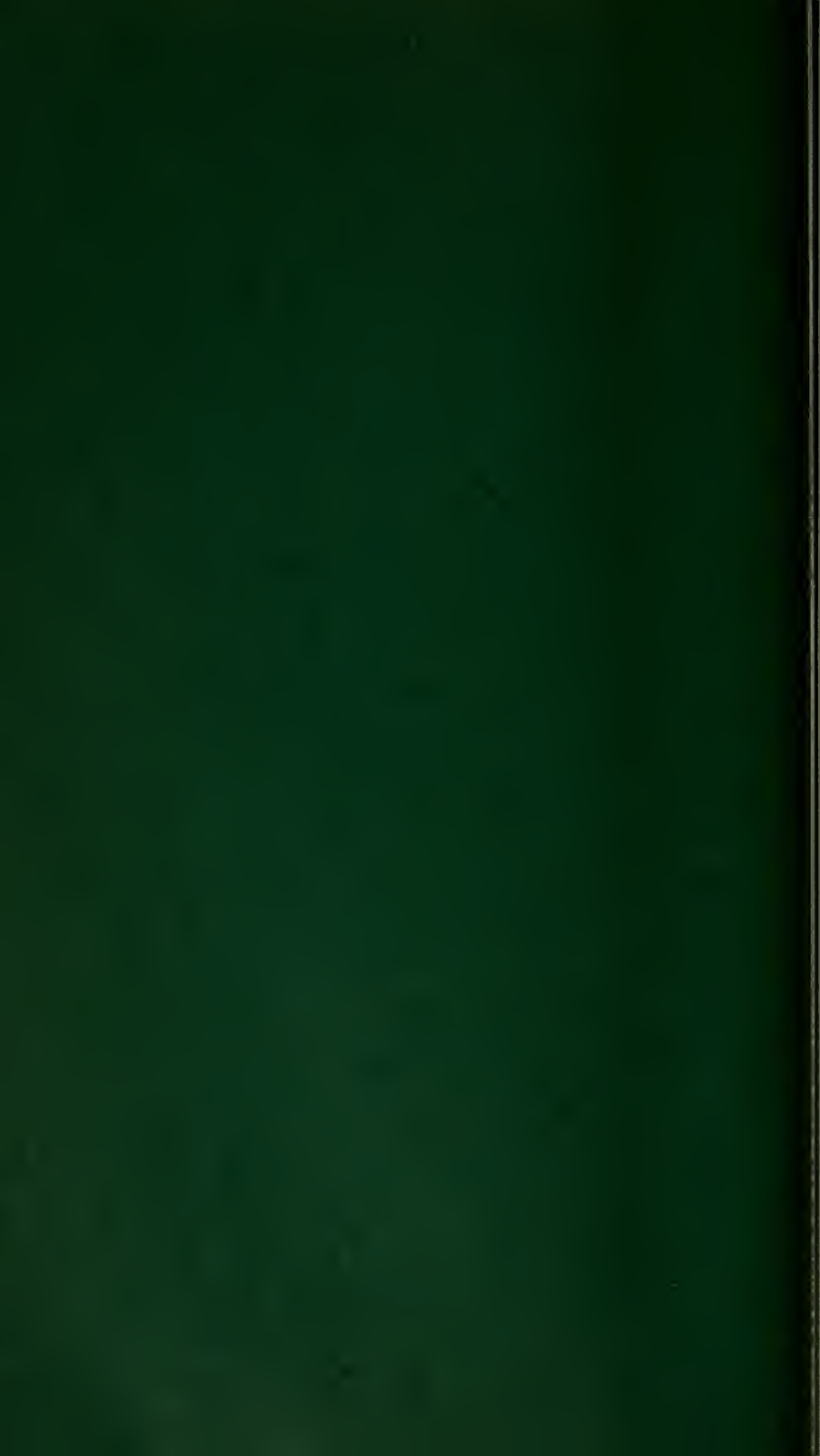
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[Endorsed]: Filed December 11, 1954.



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No. 14588
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant and Cross-Appellee,

vs.

ADOLPH G. SUTRO,

Appellee and Cross-Appellant.

**BRIEF OF APPELLANT AND CROSS-
APPELLEE.**

Jurisdictional Statement.

This is an appeal from a judgment of the District Court for the Southern District of California, Central Division, entered on July 29, 1954. That judgment awarded money damages to the appellee in an action brought by him against the United States of America arising out of negligent conduct on the part of employees of the United States of America acting within the scope of their employment, which conduct was alleged to have injured the appellee [R. 4, 9-11]. Jurisdiction to entertain that action was conferred upon the District Court by 28 U. S. C., Sec. 1346(b) (which section is a part of that Act commonly known as the Federal Tort Claims Act). Jurisdiction to entertain this appeal is conferred upon this Court by 28 U. S. C., Sec. 1291.

Statement of the Case.

In 1946 appellee purchased certain farm lands in the San Luis Rey District of San Diego County. These lands are riparian to a stream known as Pilgrim Creek. Sometime before 1946, in order to serve the needs of its military installation at Camp Pendleton, California, appellant constructed at this installation a sewage disposal plant. From the date of its construction until 1952 effluents from that plant were deposited in Pilgrim Creek. The water flowing in the Creek during this period thereby became so polluted that it was not fit for the irrigation of land used to grow certain edible vegetables which were grown elsewhere in the area. Before the water in the Creek became polluted, it had been used by prior owners of appellee's land for all irrigation purposes, and in an unpolluted condition could have been so used by the appellant during the period 1946 through 1952.

The District Court has found that appellant's employees were negligent in the way in which they operated the sewage disposal plant and that due to such negligence the waters of Pilgrim Creek were polluted to the appellee's injury. Appellant concedes the correctness of this finding and concedes the correctness of the District Court's conclusion that appellant is liable in damages to appellee under the Federal Tort Claims Act. Appellant now challenges only the District Court's award of damages.

The District Court awarded to appellee the sum of \$18,918.36 representing appellee's loss of rental value be-

cause of the polluted condition of Pilgrim Creek [R. 45]. In addition, the District Court awarded him \$13,003.03 as "increased building costs" [R. 46]. The theory upon which this second item of the award was made is as follows: When appellee purchased the land in 1946 he intended to build upon it in that year certain improvements so that he could conduct thereon an intensive farming operation; because of the polluted condition of Pilgrim Creek these improvements would be of no use to him since he could not conduct such an operation without using unpolluted water from the Creek; thus he had to wait until the condition of pollution ceased in 1952 before construction of the improvements could begin; in the interim building costs had increased and the appellant having negligently caused the delay should be made to respond in damages for such increased costs [R. 386-387].

Appellant concedes the correctness of the District Court's award with respect to the loss of rental but challenges the entire amount of the award relating to increased building costs. In challenging this portion of the award, appellant does not dispute that building costs had in fact increased in an amount represented by the award for the improvements in question during the period 1946 through 1952, but disputes the propriety of recovery for such an item in a tort action.

Question Presented.

Whether as a matter of law a party aggrieved through the commission of a tort may recover damages for an item such as increased building costs where the only evidence that such increased costs would in fact be incurred is evidence that the aggrieved party intended to build at a time of lower costs, and where the only relation between the tort-feasor and the increased building costs is the circumstance that the tort-feasor created a condition due to which the aggrieved party chose not to build, though had he chosen otherwise he could have done so at the lower cost, notwithstanding that the condition created by the tort-feasor existed.

Specification of Error.

The District Court erred in awarding the appellee damages for "increased building costs" in a case sounding in tort.

Summary of Argument.

The District Court erred in awarding to the appellee an amount representing "increased building costs." In an action in tort an aggrieved party may recover only for such damages as were "proximately" caused by the tort-feasor. There may never be a recovery for damages which are remote and speculative. The increased building costs involved in this case were not "proximately" caused by the defendant's tort and such costs are too remote and speculative to be a proper item of damage under the facts of this case.

Argument.

This is an action under the Federal Tort Claims Act for a tort which occurred in California; hence the law of California should control its outcome. (28 U. S. C., Sec. 1346(b).)

Filice v. United States, 217 F. 2d 515 (C. A. 9, 1954);

Rushford v. United States, 204 F. 2d 831 (C. A. 2, 1953).

The California rule respecting damages for which a recovery may be had in a tort action is declared by the following provision of the California Civil Code:

For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not. California Civil Code, Sec. 3333.

This section of the California Civil Code has been held by the Supreme Court of the State of California to be declaratory of the general law of tort damages.

Wells v. Lloyd, et al., 6 Cal. 2d 70, 56 P. 2d 517 (1936).

See also:

14 Cal. Jur. 2d, Damages, §70 *et seq.*

California courts recognize that speculative and remote damages may not be recovered.

Taylor v. Hopper, 207 Cal. 102, 276 Pac. 990 (1929);

Ramsey v. Penry, 53 Cal. App. 2d 773, 128 P. 2d 399 (1942).

It has however, been recognized in California that:

“There is no fixed inflexible rule for determining the measure of damages for injury to or destruction of property; whatever formula is most appropriate to compensate the injured party for the loss will be adopted.”

Basin Oil Co. v. Baash-Ross Tool Co., 125 Cal. App. 2d 578, 271 P. 2d 122 (1954).

It is appellant's position in this appeal that the formula adopted by the District Court is incorrect insofar as it makes possible an award for “increased building costs.” This position is based upon two lines of reasoning. The first is that appellant did not “proximately cause” the increased building costs within the meaning of Section 3333 of the California Civil Code, and the second is that a recovery may not be had for this item because it is too remote and speculative.

California courts have held that in order for a tortfeasor to be held the “proximate cause” of a particular injury and thus responsible for it in damages, it is necessary that the injury be the “natural and direct consequence of the tort,” *Wells v. Lloyd*, *supra*, or that the injury be such as to “naturally flow” from the tortious act, *Bartlett v. Federal Outfitting Co.*, 133 Cal. App. 747, 24 P. 2d 877 (1933), or have some “causal connection” with

the tortious act, *John Breuner Co. v. Western Union Telegraph Co.*, 108 Cal. App. 243, 291 Pac. 445 (1930). Appellant submits that these phrases state the law on this subject as accurately, perhaps, as it may be stated. However, appellant submits that standing alone these phrases are of little or no value. It is necessary to examine the item claimed in the light of the circumstances surrounding it before a proper determination may be made.

One such circumstance present here is the fact that at will, appellee could have constructed any buildings upon this land without interference from appellant. He chose not to do so while the Creek was polluted. His reason for not doing so was in all probability an economic one. However, appellant did nothing to or upon this land which would have prevented him from building. For this reason appellant urges that it was not the legal or proximate cause of this injury, if such it be. It would instead seem that the true cause lay instead in the mind of the appellee himself.

Appellant's examination into the California law of damages for the tortious injury to real property interests, and into the law of other states upon the subject indicates that a so-called normal or general rule has arisen with respect to the problem. That rule is that the tort-feasor should be made to reimburse the injured landowner for the loss of land value in the case of a permanent injury and for loss of use, *i. e.*, rental value, in the case of a temporary injury.

United States v. Fixico, 115 F. 2d 389 (C. A. 10, 1940);

Revis v. Chapman & Co., 130 Cal. App. 109, 19 P. 2d 511 (1933);

Maddox v. Yocum, 114 Ind. App. 390, 52 N. E. 2d 636 (1944);

Ryder v. Town of Lexington, 303 Mass. 281, 21 N. E. 2d 282 (1939).

The injury here was temporary. The District Court's award respecting rental value does compensate appellee for his loss of use [R. 45]. Appellant can find no specific authority for that portion of the award now in dispute. It is submitted that this item is too far removed from appellant's tort and too far beyond the scope of the normal rule of damages for injuries to real property to be a recoverable item of damage here.

An additional circumstance which appellant now asks this Court to consider is the fact that appellee purchased this land after the pollution had commenced and after the growing of certain edible vegetables with water from Pilgrim Creek had been prohibited [R. 148]. While there is nothing in the record now before this Court to show that appellee had actual knowledge of the condition of the Creek or of the prohibition of the time of his purchase, it is inconceivable that a man of appellee's business experience and acumen would not know of these facts at the time he purchased the land [R. 126-135]. If the Court agrees with this conclusion, we urge that the following argument be considered. Namely, that appellee should not be allowed the item in dispute because he knew before he owned the land that many problems, perhaps, even litigation, faced him before it would be economically advantageous for him to build. Appellant does not make this argument with respect to rental value because it feels that irrespective of knowledge of these facts appellee was the landowner, and as such, entitled to the full value of the land. However, we submit that as to increased building

costs appellee's knowledge of these conditions is significant and should operate as a bar to recovery of this item.

Appellant's research into the subject of tort damages leads it to the conclusion that the underlying principle behind all tort recovery is that unless damages are made punitive by statute, they should be awarded to make the injured party as "whole" as possible.

Milwaukee & St. Paul R. Ry. Co. v. Arms, 91 U. S. 489 (1875);

In re Schuyler, Chadwick & Burnham, et al., 63 F. 2d 241 (C. A. 2d, 1933);

25 C. J. S., Damages, Secs. 3, 17.

It seems to appellant that appellee has been made as "whole" as possible by the award of damages for rental value. To give to appellee damages for increased building costs seems to do more. It seems to give him something which he did not have before and something for which appellant does not believe the law makes it responsible.

Conclusion.

That item of damages awarded by the District Court as "increased building costs" is not under the facts and circumstances of this case, as a matter of law properly recoverable.

Respectfully submitted,

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Attorneys for Appellant and Cross-Appellee.

IN THE
United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 14588

UNITED STATES OF AMERICA,
Appellant,

vs.

ADOLPH G. SUTRO,
Appellee,

ADOLPH G. SUTRO,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

**BRIEF OF CROSS-
APPELLANT AND
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FILED

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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 14588

UNITED STATES OF AMERICA,
Appellant,
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ADOLPH G. SUTRO,
Appellee,

ADOLPH G. SUTRO,
Appellant,
vs.

UNITED STATES OF AMERICA,
Appellee.

**BRIEF OF CROSS-
APPELLANT AND
APPELLEE**

JURISDICTIONAL STATEMENT

Cross-appellant and appellee Adolph G. Sutro will for convenience herein be referred to as the plaintiff and appellant and cross-appellee will be referred to as the defendant. Plaintiff's complaint sought to recover damages sustained as a result of the negligence of the defendant and its agents. (Comp., First Cause of Action Pars. V-VII, R. pp. 9-11; Comp., Second Cause of Action, Pars. III, IV, R. pp. 12-14). It was accordingly filed under the provisions of U. S. Code, Title 28, Section 1346 (b) and Sections 2671-2680 commonly referred to as the Federal Tort Claims Act (Comp., Par. I, R. pp. 3, 4). Jurisdiction to entertain this appeal is specifically conferred upon this Court by U. S. Code, Title 28, Section 1291.

STATEMENT OF THE CASE

In 1946, plaintiff purchased some 273 acres of rich productive farm land in the San Luis Rey Valley (Comp., Pars. II, III, R. pp. 4-8). The land was bounded on the north by Camp Pendleton, a large Marine Training Center, and a natural water course known as Pilgrim Creek ran from Camp Pendleton through plaintiff's lands which were riparian to the creek (Comp., Par. IV. R. pp. 8-9). The effluent from two sewage disposal plants located in Camp Pendleton was discharged into Pilgrim Creek.

Plaintiff spent much time and effort in negotiating with the Government, endeavoring to stop the pollution, but was unsuccessful, and finally almost five years ago, on April 19, 1950, a few days before the statute of limitations would have barred his action, plaintiff filed the complaint herein.

In order to explain certain matters in the record, a rather complete statement as to the history of the case in the District Court must now be given. Defendant, after receiving an extension of time to plead, on August 25, 1950 filed a Motion to Dismiss Entire Action, to Dismiss a Portion of the Complaint, for More Definite Statement, and to Strike Matter from Pleading. This was finally heard October 13, 1950, and the motions to dismiss were denied "without prejudice to the right of the Government to make other, or further, motions at subsequent stages in these proceedings."

In its Answer filed November 1, 1950, the defendant, in addition to denying all allegations as to its negligence, denied that the District Court had jurisdiction of the action (R. p. 20), and alleged (1) that the case fell within an exception to the Federal Tort Claims Act set forth in Section 2680 (a) of Title 28, United States Code (R. p. 21) relating to "discretionary acts"; (2) that plaintiff had failed to mitigate damages (R. p. 21); (3) that the conditions complained of existed at the time plaintiff purchased

his property and that plaintiff had not actually been injured (R. p. 21); (4) that defendant had endeavored to establish additions to its sewage disposal system to satisfy and protect adjoining land-owners but that plaintiff had obstructed and blocked such efforts (R. pp. 21, 22); and finally (5) that plaintiff's damage had been caused by the acts of third persons and not by the acts of the Government, (R. p. 22).

Thereafter, the defendant, pursuant to the clause above quoted from the order of October 13, 1950, filed successively a Motion for Summary Judgment, an Amended Motion for Summary Judgment, and a Renewed Motion to Dismiss for Want of Jurisdiction. Written briefs were submitted upon each of these motions, and each motion was argued orally. The defendant at all times strenuously urged that it could not be held liable to plaintiff under the Federal Tort Claims Act for the damages caused by the pollution, claiming (1) that plaintiff must name a specific Government employee who had polluted the stream, and (2) that the actions of the defendant were "discretionary acts" and were within exceptions to the Act.

Each successive motion was denied by Judge Weinberger sitting in San Diego, the last motion being denied June 25, 1953, more than three years and two months after the complaint was filed.

In view of the foregoing record, Judge McCormick, the District Judge who heard the evidence, determined with the full consent of both plaintiff and defendant that all evidence upon the question of the defendant's liability should first be introduced, that arguments thereon should be heard, and that the question of liability should be determined, and that neither plaintiff nor defendant would present any evidence as to the amount of plaintiff's damage unless and until it had been determined that the Government was liable to the plaintiff.

Accordingly, on July 16th and 17th, and 20th to 24th, inclusive, 1953, evidence was presented in San Diego before Judge McCormick, relating to the exact manner in which defendant polluted the stream, the extent and duration of the pollution, the conduct of the plaintiff and all other matters raised by the pleadings, excepting damages. Plaintiff also introduced evidence establishing that in 1946 he commenced to construct certain structures and other improvements upon the property, but that before work had progressed far he discovered the pollution of the well above referred to, which prevented living on the ranch and rendered further use of the property impossible, so that the improvements were not made in 1946, and could not be made at least until the pollution ceased in 1952. At the conclusion of this hearing, the District Court found (1) that prior to the discharge of the effluent into the creek, its waters were suitable for the irrigation of edible crops (Findings of Fact, No. 5, R. p. 39); (2) that the sewage disposal plants were negligently operated (Findings of Fact, Nos. 2, 3, and 4, R. p. 38), and that as a consequence of this negligence the waters of the creek were polluted and rendered unsuitable for irrigation of edible crops (Findings of Fact, No. 6, R. p. 39); (3) that defendant's pollution of the creek polluted a well which was located upon plaintiff's property at the time he purchased it, and also polluted another well which he dug in the fall of 1950 in an effort to mitigate damages, so that the waters of the wells could not be used to grow edible crops (Findings of Fact, No. 7, R. p. 39); and (4) that the Government negligently augmented the flow of Pilgrim Creek and caused a silting of the channel and a deposit of silt upon plaintiff's property (Findings of Fact, No. 8, R. p. 39). At this hearing it was also established that the pollution continued until July 21, 1952, over two years after plaintiff had filed his complaint, on which date the defendant finally ceased to dump the sewage

into Pilgrim Creek and instead pumped it back into another part of Camp Pendleton.

The Court concluded that the defendant was liable to plaintiff for damages for the injuries sustained.

Before the actual trial at which evidence of damages was presented, however, two additional sessions were held in Los Angeles on September 29, 1953 and on January 29, 1954, in an effort to define the issues as to damages. Finally, on March 1, 1954, the actual trial on the issue of damages commenced and continued through March 5th. Plaintiff introduced evidence establishing that because of the pollution of the well and the creek, the rental value of the property was greatly reduced, and the District Court allowed plaintiff damages for such loss for the six-year period during which the pollution continued, 1946 to 1952, in the total amount of \$18,918.36 (R. p. 45). The Court further held that the improvements could have been commenced in July of 1952, and that plaintiff was entitled to recover as an item of damage the difference between the cost of erecting a repair shed, an implement shed, a help house and a storage shed in 1946 and the cost of erecting the same improvements in 1952 (R. pp. 386, 387). The amount of such increase allowed was \$13,003.03.

Evidence was introduced by plaintiff of increased costs of other items which plaintiff desired to erect, such as his residence, the sewerage system for the property, the domestic water supply, and the irrigation works for the property, and the increased costs of purchasing agricultural and other equipment for use upon the property, all of which items are set forth in Plaintiff's Exhibit 50, but the District Court held that these items of increased costs could not be recovered.

Plaintiff endeavored to introduce evidence as to increased costs of still other designed necessary improvements, and of cer-

tain additional expenditures made by him in an effort to "mitigate damages," all of which evidence was rejected by the District Court. Appropriate offers of proof were made in each case.

The total of the items of increased costs as to which recovery was denied was over \$78,000.00; the total of the sums spent by plaintiff to mitigate damage as to which plaintiff was not permitted to introduce evidence was \$37,382.85 (R. p. 399).

Thereafter, on July 29, 1954, judgment was entered in favor of plaintiff for \$31,921.36, representing the total of the two items first above mentioned.

Defendant appealed only from the judgment of the Court fixing the amount of damages (R. pp. 49, 50), and plaintiff likewise appealed only from the judgment of July 29, 1954 (R. p. 50). The record on appeal contains only the transcript of the testimony as to damages presented at the trial in March, 1954, and does not contain the testimony with reference to liability of the defendant which was introduced at the longer hearing in 1953.

Defendant "concedes the correctness of the District Court's conclusion that appellant is liable to appellee under the Federal Tort Claims Act," and further concedes that the District Court's award to plaintiff of \$18,918.36 as loss of rental value is correct (Br. pp. 2, 3), and challenges only the award by the District Court to plaintiff of \$13,003.03 as "increased building costs." Even here, defendant does not question the amount of the increase in building costs, but confines its attack solely to the propriety of any award.

Plaintiff contends that the District Court's award of \$18,918.36 for loss of rental is inadequate, and that the District Court erred in not allowing him damages for the increased costs of the other buildings and improvements for which plans had been drawn, and in excluding evidence as to expenditures made at

the written request of the Government to minimize damages.

By stipulation filed with, and approved by, this Court, the plaintiff's reply brief to the Government's brief as appellant, and plaintiff's opening brief as appellant, are combined in this single document.

QUESTIONS PRESENTED

1. When plaintiff is prevented by defendant's negligent pollution of his water supply from living upon and proceeding to make improvements upon his property, is he not entitled under the provisions of Section 3333 of the California Civil Code to recover:

(a) The additional sums which he must now expend to make the same improvements, and to purchase the same equipment; and

(b) Sums which he expended in an effort to mitigate damages?

2. Does not the evidence as to the loss of rental value require a judgment awarding a greater sum than that allowed by the trial court?

SPECIFICATIONS OF ERROR

The District Court erred:

1. In refusing to allow damages for the increased costs, as shown by testimony in the record, of:

(a) Erecting plaintiff's residence and guest house;

(b) Installing the system to supply water for domestic and irrigation purposes, including pumps and pipe-lines;

(c) Purchasing equipment to be installed in plaintiff's repair shop for use in maintaining and operating his ranch; and

(d) Installing the sewerage system necessary to make the premises habitable.

2. In rejecting evidence as to the increased costs of:

(a) Leveling, fencing, constructing necessary roads, and landscaping plaintiff's property;

(b) Purchasing the farm machinery and equipment, including an automobile and 3 trucks for use on the premises.

As to all items in this paragraph 2, defendant made the following objections:

"Mr. Abbott: Your Honor, I don't know whether our understanding of the other day is still applicable in this session or not, but to save time, I would like to make a blanket objection to all of the testimony of the witness relating to his intentions in 1946 or any time prior to the present date, with respect to improvements to be constructed upon the property, on the grounds that it is hearsay, it is irrelevant and immaterial. And I will request a stipulation from counsel to the effect that that objection may be deemed interposed to this whole series of questions to which it will relate." (R. pp. 343-44)

"Mr. Abbott: Your Honor, at this time, the government would like to make a single objection, which, if counsel will so stipulate, will be applicable to all the evidence to be given by this witness, and that is this objection: That the testimony called for by the question under consideration, and all subsequent questions of this witness, is evidence inadmissible because it is irrelevant and immaterial, and does not constitute the proper measure of damages under the Tort Claims Act." (R. pp. 501-02)

As to Item (a), it made the following additional objections:

"Mr. Abbott: This probably is the appropriate time for the Government to interpose its objection. I wanted counsel to be able to lay his foundation. However, we seem to be getting into the substance of the exhibit in the matter. Once again, this is a document of recent origin, your Honor, and there has been no objective manifestation whatsoever of an intention to fence this area whatsoever. This plan, as I recall, contains about 25,000 feet of fencing, with nothing in the record at all to indicate objectively the witness' intention in the year 1946. (R. p. 374).

"Mr. Abbott: Well, we, for the record, interpose the objection that the witness' mental state in the year 1946 is not relevant or material." (R. p. 376).

"Mr. Abbott: Your Honor, we have the additional objection that there is no evidence of any kind relative to those improvements described in the last question. Not even the charts that the witness made in late 1953 contain that data." (R. p. 504).

"Mr. Abbott: Objection. It is immaterial and irrelevant, your Honor." (R. p. 504).

As to Item (b), plaintiff offered in evidence defendant's Exhibit 44-0 for Identification, a list of farm machinery and equipment, including the automobile and 3 trucks, and defendant made the following additional objection:

"Mr. Abbott: Your Honor, we will object at this point. This list appears to be of recent origin, and I think not only

is objectionable for reasons stated in our standing objection, but also because it is without the scope of the Court's ruling." (R. p. 362).

Each of defendant's objections was sustained.

The nature of each item and the increase in cost of the items referred to are set forth on pages 27A, 35A and 36A of Plaintiff's Exhibit 50; the increase in cost is summarized on lines 6, 16 and 18 of page 3A of the same exhibit, where it is shown that the cost of leveling, fencing and landscaping increased \$5325.00, the cost of farm machinery and equipment increased \$10,125.00, and the cost of the automobile and trucks increased \$5270.00 during the period from 1946 to 1950, making the total increase in cost of these items \$20,720.00. These portions of Exhibit 50 were offered in evidence at page 538 of the Record; Mr. Abbott stated that "The Government renews the objections previously tendered to that offer;" and the objection was sustained.

3. In determining the amount of damages sustained by plaintiff as a result of the loss of rental value. The preponderance of the evidence clearly establishes that the difference between the rental value of the land with an unpolluted water supply and the rental value with the water supply polluted by the defendant's negligent acts was far in excess of \$18,918.36, the amount fixed by the District Court, and was, in fact, between \$55,376.36 and \$58,876.36.

4. In rejecting evidence as to expenditures made by plaintiff for labor, seed, sprays, fertilizer, repairs, rental of equipment, depreciation of equipment, telephone and telegraph expenses, warehouse rent, insurance, traveling expenses and miscellaneous items in the total sum of \$37,382.85 which were incurred by plaintiff in an effort to mitigate damages, and which by reason of defendant's negligent acts resulted in no permanent benefit to the

property. Plaintiff's offer of proof as to these items is contained at pages 398 and 399 of the record; defendant's objection, which was sustained, was as follows:

"Mr. Abbott: At this time the Government objects to the offer of proof on the ground that the evidence tendered is irrelevant, incompetent and immaterial, that it does not constitute evidence of damages recoverable under the Tort Claims Act, and that there has been no proper foundation laid for such evidence as evidence in mitigation of damages, or otherwise." (R. pp. 399-400)

SUMMARY OF ARGUMENT

1. The District Court correctly awarded plaintiff damages for the increased costs of erecting certain buildings for which plans and specifications had been prepared,* but which plaintiff was prevented from erecting by reason of defendant's negligent pollution of the creek. The Court should also have awarded plaintiff damages for the increased cost of erecting his residence and a guest house, including sewerage, fencing, grading and incidental expenses, since the use to which the improvements were to be put after their completion is immaterial. The Court should likewise have awarded damages for the increased costs of the irrigation system in its entirety, since this system was actually designed and was essential in 1946, and the increased costs can be ascertained with certainty. The Court should further have awarded damages for the increased cost of machinery and equipment for the repair shop as well as farm machinery, tractors, and equipment, since

*Note: Construction had actually been commenced on certain buildings, see footnote, page 13 *infra*.

plaintiff actually sustained damage to the extent of the increased costs of these items as a result of defendant's conceded negligence and, under California Civil Code, Section 3333, he is entitled to compensation "for all the detriment proximately caused" by such negligence "whether it could have been anticipated or not."

2. The defendant concedes that plaintiff is entitled to recover the difference between the rental value of his property with an unpolluted water supply and the rental value with a supply polluted by defendant's act for the six-year period in question (Br. pp. 2, 3). Three witnesses offered testimony as to the extent of the damage; the District Court accepted the testimony of defendant's expert, Stanley E. Goode, Jr., which was contrary to the testimony of the other witnesses, although it was shown on cross-examination that Mr. Goode's computations (1) were based upon a supposed acreage of plaintiff's property, which was too small; (2) were based upon a false theory as to the relationship between rental values and sales values; (3) were based upon comparisons with rental values of land which did not have a comparable supply of water; and (4) were made in ignorance of actual rental figures paid for land comparable to plaintiff's and located closer to plaintiff's land than were the lands considered by Mr. Goode. The testimony of the remaining witnesses establishes that the actual loss of rental was between \$59,876.36 and \$55,376.36, and the District Court should have awarded this sum to plaintiff.

3. Plaintiff was specifically directed in writing by defendant to mitigate damages, and he was obliged under the law so to do. The District Court should have permitted him to introduce evidence as to the exact expenditure so made so that the propriety of such expenditures could be determined and so that plaintiff could be awarded judgment for the amount of such expenditures properly chargeable to the defendant.

ARGUMENT

I.

PLAINTIFF IS ENTITLED TO RECOVER DAMAGES EQUAL TO THE INCREASED COSTS OF ALL IMPROVEMENTS.

A. RECOVERY WAS PROPERLY ALLOWED FOR THE FARM BUILDINGS REFERRED TO IN THE JUDGMENT.

Plaintiff's position is as follows: In 1946 he purchased the property in question and commenced to make improvements. Prior to the defendant's action the waters of Pilgrim Creek and of the well were pure and wholesome (Findings of Fact 5, R. p. 39). However, plaintiff, after starting construction, discovered that the water in the well was polluted, (as was the stream, at the time he purchased the property) as a result of the defendant's negligence.* The correspondence introduced in evidence shows in part, the efforts made by plaintiff to secure a speedy settlement

*At page 8 of its brief defendant refers to the fact that the growing of edible vegetables upon plaintiff's property had been prohibited a few weeks before plaintiff purchased the property, and states that while it does not appear in the record now before this Court, a man of plaintiff's intelligence must have known that he faced litigation and delays in occupying and using the property. Counsel preparing the Government's brief on this appeal did not try the case, and in making the statement just referred to must have been unaware that the testimony at the July, 1953 hearing established that although the creek was known to be polluted when plaintiff purchased the property, the pollution of the well was not then known. Plaintiff had started construction of the buildings, relying upon the well water for a supply of pure water for domestic purposes, and was obliged to stop operations when he discovered the pollution. (See typewritten transcript, proceed-

of this problem (see Defendant's Exhibits B1 to B23, inclusive, for example), and much of the lengthy testimony at the first session of the trial in 1953 was devoted to this point. The correspondence and this testimony established that the pollution continued from 1946 to 1952. The trial court found, and the defendant now concedes, that the defendant's negligence rendered the water of the wells and the creek—that is, all water available

ing July 17, 1953, pages 150-153; see also Exhibits 21 and 22; see also R. pp. 354, 355).

Moreover, the Government at that hearing, in its cross-examination of Mr. Wilson, plaintiff's expert on pollution, and in much of its cross-examination of plaintiff, endeavored to prove that the pollution of the creek as a matter of fact did not pollute the well, so that it cannot now claim that plaintiff should have anticipated that the well would be polluted merely because he knew the creek was. (See typewritten transcript, proceedings July 17, 1953, pages 121-131, and July 20, pages 244-267).

The testimony at this hearing further revealed that plaintiff then expected an early cessation of the pollution of Pilgrim Creek by the Government, and never anticipated that he would be obliged to bring an action against the Government to stop the needless pollution, not only of the creek, which pollution was known when plaintiff purchased the property, but also of the well, which pollution was not then suspected. (See for example, typewritten transcript, proceedings July 20, pages 301, 302).

Clearly then, since the delay in building was caused by the unknown pollution of the well, there is no merit in defendant's present contention. If the Court believes that the allegation in defendant's brief is of importance, plaintiff, pursuant to the provisions of Rule 75(h) of the Federal Rules of Civil Procedure relating to Appeals, will ask leave to have the portions of the typewritten Transcript, to which reference has been made, printed. They were not previously printed because defendant, in its Statement of Points upon Which Appellant United States of America Intends to Rely on Appeal (R. p. 689), referred only to the *amount* of damages and did not question its liability, and it was not believed that this testimony would be material upon the issue of damages.

for use on plaintiff's property—"unfit and unsuitable for the irrigation of edible crops" and *a fortiori* unsuitable for drinking purposes (See Findings of Fact 5 to 7, R. p. 39).

Plaintiff therefore did not in 1946 complete the improvements he had begun because until the pollution stopped it was obviously impossible for him to grow edible crops upon the property or even to live on it, since there was no safe water supply for drinking or domestic purposes. Not until after the pollution finally ceased was plaintiff in a position to construct the improvements. However, in the six intervening years costs had increased greatly so that the improvements which would have cost \$157,-702.00 in 1946 would cost \$249,391.00 in 1952 (see Plaintiff's Exhibit 50, page 3A).

The trial court held:

"Now, whatever he spent, whatever he has to spend now or after the nuisance was abated, in other words, after the water was not contaminated by this noxious effluent, if there is an increase in the cost of the buildings that were necessary to do the job, I think the additional cost over the estimate which he has, as indicated by the plans, drawings and specifications, is the measure of damages in the case. I think they are part of the detriment that has been caused by reason of the negligent acts of the government officers in not removing this contaminating effluent from the stream of Pilgrim Creek." (R. p. 386)

However, the Court actually gave judgment for the increased costs of only 4 buildings, and refused recovery for increased costs of the other items, stating in its Award and Order for Judgment that the damages were "found to fall in categories of uncertainty,

remoteness, infeasibleness, unnecessary, and are respectively disallowed in this action.” (R. p. 46).

Defendant now concedes that the building costs actually increased by the amount of the award (Br. p. 3), but contends that the Court erred in allowing any damages for such increased costs; plaintiff contends that the Court erred in not awarding damages for the increased cost of other items, as to some of which evidence was admitted and as to some of which evidence was rejected.

The Federal Tort Claims Act provides (U. S. Code, Title 28, Section 2674):

“The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.”

Defendant concedes that since the pollution of the water supply by defendant occurred in California, the law of California controls, and that the applicable statute is Section 3333 of the California Civil Code, which reads as follows:

“For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not.”

The California law applying this statute is well stated in *Givens v. Markall*, 51 C. A. (2d) 374 at page 379:

“There is no fixed rule with respect to the measure of damages for the wrongful injury or destruction of property. Each case must be determined on its particular facts. It is said in 15 *America Jurisprudence*, page 514, section 106, in that regard:

“ ‘There is no fixed rule for determining the measure of damages for injuries to, or destruction of, property in every case. The amount to be awarded depends upon the character of the property and the nature and extent of the injury, and the mode and amount of proof must be adapted to the facts of each case. In ascertaining the damages to be allowed, the jury may consider all the circumstances connected with the injury.’ ”

“In the last-cited authority, at page 515, section 107, it is further said:

“ ‘One whose real property is injured by another’s wrongful and negligent act is entitled to such damages as will compensate him for the injury or loss sustained. No hard and fast rule can be laid down, however, for the measurement of those damages; whatever rule is best suited to determine the amount of the loss in the particular case should be adopted . . . ’ ”

In *California Orange Co. vs. Riverside Portland Cement Co.*, 50 Cal. App. 522 (1920), dust emitted from defendant Cement Company’s plant blew across plaintiff’s orchard, causing serious injury. The trial court allowed damages for (1) loss of crops during the three-year period that the nuisance continued, (2) the cost of additional labor necessitated by the nuisance, and (3) the

loss of future crops after the abatement of the nuisance. In affirming the judgment of the trial court, the District Court of Appeals, relying upon and quoting Civil Code, Section 3333, said at page 530:

"The measure of plaintiff's damage is the amount that will compensate it for all the detriment proximately caused by defendant's wrongful operation of its plant, from the time it commenced operations in January, 1910, until it installed the 'treator' in January, 1913."

The Court concluded that the plaintiffs were entitled to recover for the increased costs of operation of the grove during the years subsequent to the abatement of the nuisance, caused by damage arising from the dust.

In the Cement Company case, the defendant was held liable for increased *operating* costs arising from its tortious conduct; in the case at bar, the District Court has held defendant liable for certain increased *capital construction* costs arising from its tortious conduct. The holding of the Cement Company case clearly justifies the award of the District Court herein.

None of the authorities cited by the defendant is contrary to these cases. The decisions referred to by defendant merely state the general rules of damages, particularly with reference to causation, but none of them holds that increased construction costs necessary to complete a project may not, under proper circumstances such as here exist, properly be an item of damage.

Defendant states that its position "is based upon two lines of reasoning"—(1) that defendant did not "proximately cause" the increased cost, and (2) that the item is too remote and speculative (B., p. 6).

The fallacy of this argument is apparent. Suppose plaintiff

had followed the course suggested by defendant in its brief, and had erected his residence and made the other improvements in 1946. Defendant has conceded that the water supply was polluted and remained so for 6 years as a result of its negligence. Not even the defendant would contend that plaintiff could have lived in his residence during that period; no Board of Health would even have permitted him to do so. But if defendant's theory is correct, plaintiff should have erected the six buildings and installed the pipes, pumps and machinery referred to on the blueprints and other documents (see Plaintiff's Exhibits 38, 39, 44A to 44M inclusive) and in the Report of the American Appraisal Company (Plaintiff's Exhibit 50) at a cost in 1946 of \$157,702.00, knowing that he could not use any of the property, and not knowing how long this condition would continue to exist. Actually, the situation would have continued for more than 6 years until the defendant in July, 1952, finally ceased negligently polluting the creek. Obviously, plaintiff could not have left the buildings and valuable machinery unattended for this time, so a watchman on constant duty would have been required. When the pollution finally ceased, plaintiff would have lost (1) six years' interest on the money invested, (2) six years' taxes on the improvements, (3) six years' depreciation (and depreciation on unused machinery and vacant buildings is exceedingly great), and (4) the wages of a watchman for 6 years of 365 days each, or 2190 days, or 52,560 hours. The last item alone at \$1.00 per hour amounts to \$52,560.00.

The defendant on various occasions advised plaintiff of the obligation upon him "to minimize damages." See, for one example, Defendant's Exhibit B6, a letter from the Public Works Officer of the Eleventh Naval District to plaintiff dated September 20, 1946, in which he specifically called plaintiff's attention to "the general legal principle requiring persons under certain

conditions and circumstances to 'mitigate damages,'" and stated that "it would appear that it would be to your best interest to proceed along such lines as would be considered to be in compliance with said general principle of law." Had plaintiff erected the improvements and put in a claim for the items above enumerated, the defendant would now contend (and probably correctly) that plaintiff had no right to increase his damage by such conduct.

Would any member of this Court as a reasonable prudent man invest \$157,000 in property which was being contaminated by sewage effluent until the negligence which caused the contamination ceased? Or could plaintiff, or any member of this Court, in 1946 have anticipated that by 1952 the cost of making the improvements would have increased as greatly as it did?

The measure of damages allowed by the Statute is "the amount which will compensate for all detriment proximately caused thereby, whether it could have been anticipated or not" (California Civil Code, Sec. 3333). Plaintiff is now in process of completing the erection of the improvements so long since started; he is actually being damaged by the increased cost. He was in no way responsible for the increased cost. Defendant, whose fault alone caused the loss, should compensate him for it.

Clearly, then, the award of the District Court for the increased cost of erecting the 4 buildings referred to in the Court's judgment should be affirmed.

B. PLAINTIFF SHOULD ALSO RECOVER THE INCREASE IN COST FOR THE OTHER IMPROVEMENTS AS TO WHICH EVIDENCE WAS INTRODUCED.

The District Court permitted plaintiff to introduce evidence as to the increase in the cost of erecting the residence and guest house, the sewerage system, the domestic water supply and irri-

gation works, including the irrigation pumps, and the machinery and equipment to be installed in the maintenance and repair shop. However, in its final judgment, it disallowed damages to cover these increases. Recovery for each item should have been allowed.

1. Recovery should be allowed for the increased cost of erecting the residence.

"Immediately after the purchase of the property" plaintiff had prepared an entire group of plans for various structures (R. p. 342). These plans were all marked as portions of Plaintiff's Exhibit 44 and the individual sheets were further designated by letters and subsidiary numbers.

Exhibits 44I-1, 44I-2 and 44I-3 are three blueprints constituting a part of this series prepared in 1946 for the residence in which Mr. Sutro intended to live with his mother (R. p. 354). Exhibit 44I-4 represents specifications for the residence prepared later in 1946. Plaintiff had actually commenced construction of the residence as well as the shop when he learned of the pollution of the well (R. p. 354, 355); and at the trial he testified that and he still intended to construct it (R. p. 355). (The construction is in process at the present time.)

Mr. Burlake, plaintiff's expert witness on building costs, was able from the plans and specifications to determine what the cost of the residence would have been in 1946 and what it would have been in 1952 (R. p. 501-503). Defendant's expert appraiser, Mr. Vaughn, was also able to make estimates of the cost in these two years (R. p. 658, 659).

The plans were definite; the amount of increased costs can be definitely ascertained; and the only reason for denying the recovery, apparently, was the belief of the District Court that plaintiff could not recover because the building was to be used as a

home and not for business purposes (R. p. 387, 388).

Analysis shows that recovery for this item of damage should have been allowed, for plaintiff is not seeking to recover any sentimental value. That value is lost forever and no Court can ever make plaintiff whole for that loss. The years of his life since January of 1946 are gone beyond recall, and no judgment of this Court can turn back the hands of the clock or grant plaintiff the joy of which he has been deprived, of living in a home of his own upon this property in the years following 1946.

What plaintiff seeks to recover is not the sentimental value of living in this home, but rather the hard dollars and cents difference between the cost of constructing the home in 1946 and the cost of constructing it in 1952. Assuming that all the structures had been built in 1946, and that the Government had negligently burned them all to the ground, could it be argued that the Government was bound to rebuild only the farm buildings and not the residence merely because plaintiff lived in the residence? Obviously a 2x4 costs as much in place in a residence as in any other building, and a fire insurance company pays its losses upon residence property just as it does upon commercial property, based upon insurable value and not upon sentimental value.

Or, suppose again that the buildings had all been erected, and that the Government sought to condemn them to enlarge Camp Pendleton. Could it be said that the plaintiff would be entitled to no compensation for the taking of his residence merely because it was his residence? To state the argument is to answer it—and just as the defendant in a condemnation action is entitled to the fair market value of his dwelling equally with the fair market value of his store or factory, so in the case at bar Mr. Sutro is entitled to the difference between the cost of erecting his residence in 1946, according to his plans then prepared, and the cost of erecting it in 1952.

Or, again, suppose that all the buildings had been erected, and defendant had actually dumped its polluted sewage into the various buildings, requiring each of them to be rehabilitated in order to be used again. There could be no legitimate distinction between plaintiff's right to recover for the damages to his residence in such a case and his right to recover for the damages to his other buildings.

The foregoing argument is naturally strengthened—if any added strength is necessary—by the fact that the residence was to be used as an office for farm purposes and was planned to contain plaintiff's safe, drawing-board, technical library, maps and business papers, etc., and was also equipped with a utility room for farm purposes and a freezer room to store farm produce and supplies (R. pp. 472-474).

The increase in cost of the residence should therefore have been included in the judgment.

2. Recovery should be allowed for the increased cost of erecting the guest house.

The foregoing argument applies to the guest house. The blueprints for this building were designed at the same time that those for the residence were, and were introduced in evidence as plaintiff's Exhibits 44J and 44J-1. Plaintiff testified at the trial that he still intended to erect this building (R. p. 357). (It is part of the construction underway when this brief is written.) It is referred to as Building No. 4 in plaintiff's Exhibit 50. For the reasons above stated, plaintiff has been damaged to the extent that the cost of erection in 1952 of this guest house exceeds the cost of erecting it in 1946, and this amount likewise should have been included in the judgment.

3. *Recovery should be allowed for the increased cost of installing the sewerage system.*

The Court can take judicial notice of the fact that a residence in a rural area requires a septic tank and sewer system. The plans for such a system are shown on plaintiff's Exhibit 44N. While the lines showing the specific pipes and equipment were not placed upon the ground plan until 1953, the plans for the residence which were prepared in 1946, included 2 bathrooms, and the plans for the guest house and help house also prepared in 1946 included bathrooms, all of which obviously required some sewer connections. When, as in such a case, the particular items were clearly required in 1946 to make the premises habitable, the important factor is not: were precise plans drawn in that year, but rather can the amount of plaintiff's damage as a result of the defendant's wrongful conduct be ascertained with any accuracy. Mr. Burlake testified that his estimate was based upon construction in accordance with the requirements of the San Diego County Health Department, and the increased cost of such a system could therefore readily be determined, (R. p. 504). This increase is, therefore, a proper item of damages.

4. *Recovery should be allowed for the increased cost of installing the domestic water supply system.*

Plaintiff's Exhibit 44M, prepared in 1946, shows in detail the plans for the water system to supply plaintiff's buildings with a domestic water supply. The buildings would, of course, be unusable without such a system. Neither defendant's nor plaintiff's witnesses had any difficulty in ascertaining the increased cost of construction, and for reasons previously advanced recovery of this increased cost should have been permitted.

5. *Recovery should be allowed for the irrigation system in its entirety.*

Plaintiff concedes that the documents introduced in evidence as plaintiff's Exhibits 38 and 39, which show in minute detail the pipelines, reservoirs, and irrigation system, were not prepared until 1953 (R. p. 147, 151, 156.). However, this does not mean that the increased cost of installing the system should not be allowed.

Since an irrigation system in a semi-arid area is as essential to profitable farm operations as a septic tank and sewer system, the important fact is not whether the precise plans and blueprints in evidence were created in 1946. The two questions which alone require answering are: (a) was the system actually intended in 1946, and (b) if so, can the increase in the cost of that system be ascertained with any accuracy. The evidence establishes that each question must be answered affirmatively, and it therefore follows that the increase in costs is a proper item of damages.

(a) *The system was actually intended and planned in 1946.*

Mr. Tedford and Mr. Sutro both testified as to conversations late in 1945 and early in 1946, between Mr. Sutro and representatives of the Soil Conservation Service with reference to the irrigation system and the dam (R. pp. 95, 96, 146, 177). Mr. Sutro wrote various letters, beginning December 12, 1945, at a time when the purchase of the property was still in escrow and before the deed to it had been recorded, and continuing into early 1946, which were introduced in evidence (Plaintiff's Exhibits 35 and 37) in which he specifically referred to the fact that the plans were being prepared for an irrigation system and requested information about pumps from pump manufacturers, etc. (R. p. 137 ff).

Indeed, he testified that he consulted them so often that he finally was ashamed to request more information from them (R. p. 157).

Plaintiff purchased the property for the purpose of growing vegetables (R. pp. 148-150). He regarded the system previously used by his predecessors in interest as inefficient (R. p. 136). He testified to the characteristics of the system he planned to install. It includes pumps of relatively small size which operate 24 hours a day, filling two reservoirs and a dam so that quantities of water as large as several irrigators can handle can be turned on to the fields and so that a surplus of water will be available in time of hot, dry winds, which will enable the entire area to be irrigated rapidly when necessary to save a valuable crop which may be lost if water can be applied only as fast as it can be pumped (R. pp. 159, 160). The system is specifically designed to operate economically—to secure the lowest possible electric stand-by charges and power rates, to utilize labor most efficiently, and yet to secure the lowest possible crop insurance premiums.*

The red lines on Exhibit 39 indicate the drainage system to reclaim the 18 acres of alkali land (R. p. 162, 163), referred to *infra*, page 37, the blue lines on Exhibit 38 indicate concrete irrigation pipes, and the brown lines steel irrigation pipes (R. p. 147).

Defendant objected to the introduction in evidence of these exhibits upon the ground that they were not prepared until 1953; however when plaintiff was asked why he did not "put those

*Since the trial in March of 1954 almost all of the irrigation system has been installed in accordance with these plans; it will be entirely completed before this case is decided by this Court. If the Court believes this to be an important factor, recovery of the amount here involved could be made contingent upon such actual completion, and the case could be remanded to the District Court in order that evidence of the facts could be introduced and judgment rendered accordingly.

lines on a map in 1946" he replied:

"Why, I might answer that by saying that this irrigation system is so simple, we did put it on paper. We put it on paper regularly, frequently. It never seemed necessary to draw it out on a map. After all, the calculations in regard to pipe friction, pump activity, (*sic*) lift, capacity of dams and things, are not too involved.

"We would make the calculations, send the inquiries to the pump people, and then pray that the Navy would go through with whatever was their current plan. Then when that was changed, we would do that all over again. They were merely work sheets. The actual delineations of these pipelines, your Honor, is really nothing.

"I might say that having had a moderate degree of success in organizing construction crews. We built that entire ice rink, with the exception of the piping layout of my refrigeration engineer, and the only plans we had were stuff drawn on the back of a couple of envelopes, and you could build several irrigation systems for the cost of that project." (R. pp. 167-168)

The last statement refers to plaintiff's previous testimony (R. p. 131), regarding his experiences in designing the ice rink at Sutro Baths, San Francisco, which he formerly owned and operated.

Plaintiff also testified that he had drawn up numerous plans, but couldn't find them anywhere and that he had spent 3 days unsuccessfully trying to reconstruct the plans from the fragments which he could find (R. pp. 155-156). He concluded at page

156 of the Record:

"The only solution that seemed fair and reasonable was then to produce the minimum plan which would give a satisfactory irrigation system and use that as a basis. There is no representation in the slightest that this plan was made in 1946."

Had the plaintiff in 1946 believed that litigation with the Government was necessary, or would ensue, or had he foreseen the increases in building costs, he would have carefully preserved the drawings which he had prepared. In any event, the foregoing summary of his testimony, and his testimony in its entirety, especially the correspondence in 1945 and 1946, together with the testimony of Mr. Tedford of the Soil Conservation Service, to which we have previously referred, establish beyond the shadow of doubt that an irrigation system was definitely planned in 1945 and 1946, even though the plans then drawn were of "the back of an envelope" type which could not be produced in 1954 at the trial, so that the more formal plans prepared in 1953 were the only ones introduced in evidence.

The irrigation system was an indispensable part of the ranch and of Mr. Sutro's plans, and the acts of the defendant precluded its construction in 1946. The increased cost of construction in 1952 should therefore be included in the judgment to be rendered by this Court.

(b) *The increase in costs can be ascertained with certainty.*

Mr. Burlake testified that from the data submitted to him by Mr. Sutro he could ascertain the details of the irrigation system

(R. pp. 508, 524, 525). That is, distances could be determined by scaling the maps, sizes of pipe were indicated, the specifications of the dam were set forth in Exhibit 40 which was the paper prepared by the Soil Conservation Service in 1949 (R. p. 161), etc. Mr. Vaughn, defendant's expert on construction costs, testified without apparent difficulty as to his computations of the increase in cost of constructing the system in 1952 over 1946 (R. p. 660) and stated that he was able to make his estimates from the information contained on the documents furnished him (which were the Exhibits in the case), assisted in some cases by information received from Mr. Burlake as to specific costs and other matters where it was easier to use Mr. Burlake's report than to compute the details from the Exhibits (R. pp. 655, 656). This indicates that there is no ambiguity in the plans, and that the actual detriment suffered by Mr. Sutro as a result of delay in the construction of the irrigation system occasioned by defendant's wrongful conduct can readily be determined.

The defendant did not show that the system was extravagant or included any unnecessary items. There is no reason, therefore, why the judgment should not include the increased cost of its construction.

6. Recovery should be allowed for the machine tools.

Plaintiff throughout his life has worked with tools and during the period when he owned and operated the Sutro Baths & Ice Rink he personally maintained the meters, regulating devices and some of the heavy machinery (R. pp. 127-136; especially 135). In 1946, when he laid out the plans for the buildings on the property here involved, he included a repair shop to house machinery to be used to repair ranch equipment and for other pur-

poses (Plaintiff's Exhibit 44D, R. p. 347). (The trial court included in its judgment an award for the increase in the cost of erecting this shop; R. p. 46). The shop was specifically designed to house the tools, and the blueprints for the building plainly showed designated locations for the various machine tools for which the increased purchase cost is now claimed. The shop was partially erected at the time of trial (R. pp. 353, 662, 663). Plaintiff's past experience with machines and tools indicates why he desired a fairly complete shop—first, to maintain his farm machinery properly and economically; second, to experiment on new farm devices, such as the automatic irrigating device concerning which he testified (R. p. 133); and third, to work on inventions in various other fields, such as his self-braking trailer (R. p. 133) and his originally designed world's record-breaking hydroplane (R. pp. 128, 129) which he piloted as holder of United States Seaplane License No. 1 (R. p. 130).

Plaintiff's Exhibit 44G contains a list of the brand names of the tools to be installed in the locations designated for them in the plans. This list of brand names was prepared in 1953 but it represented the same quality of tools that plaintiff had expected to purchase in 1946, except where the tools were of a cheaper quality. None was of a better quality (R. pp. 349, 352). Certain small items are included in this list which were not shown on Exhibit 44D, such as hand tools to be used with the lathe which is designated on Exhibit 44D; however, as Mr. Sutro stated, the lathe would be useless without these tools to use in conjunction with it (R. pp. 381-383) and the main items are all set forth on the blueprint which was prepared in 1946.

Defendant devoted much time to cross-examining plaintiff as to the need for such a shop and such extensive equipment (R. pp. 437-442), and argued that because not every ranch in the

San Luis Rey Valley had such items their cost should not be considered. However, whether the shop and tools therein are those which an average farmer would have is immaterial. To return to the analogies mentioned in the case of the residence, if the machine shop and tools had been in existence and had been destroyed by fire, or had been condemned by defendant, or had been damaged by sewage, the Government would be liable for the detriment sustained by Mr. Sutro as a result of its actions, even though not another farmer in the United States possessed such a building or such tools. Surely America has not reached the condition where an individual who has been damaged by another individual, or by his own Government, can recover only the value of an "average shop," or the value of tools "customarily used by an average farmer," regardless of his actual loss. The question is not, what is the difference in cost of the hypothetical average shop and average tools from 1946 to 1952; but rather, what is the increase in cost between 1946 and 1952 of erecting the particular shop Mr. Sutro designed, had started to erect, and has now practically completed, together with the cost of purchasing and installing in it the specific tools for which it was especially designed in 1946.

To a man of Mr. Sutro's background, tools were vital. He had designed a specific building to house his specific tools as he wished them housed. He had shown on the building plans the size and the nature of each tool. While no brand names of tools were specified in 1946, Mr. Sutro testified that the tools on the list appraised by Mr. Burlake were in the same relative price and quality range as those he intended to buy in 1946, and would have bought but for the Government's actions. The remainder were cheaper. Here, as in the case of the septic tank, the presence or absence of a list of brand names prepared in 1946 is not the question. The question is the right of plaintiff to recover for the damage proximately caused by the increase in the price of the

tools during the period the pollution continued, which increase in price constituted part of the "detriment proximately caused" him by the defendant's wrongful conduct.

Everything in Mr. Sutro's testimony, both on direct examination and on cross-examination, indicated without question that the tools were at all times to be installed in the building, and that some of them had already been purchased at the time of trial. More tools have since been purchased as the building program has progressed far enough so that they may be placed upon the property with safety, and may be used by Mr. Sutro, for the purposes for which they were at all times intended; here, as in the case of the irrigation system, this Court, if it so desires, can request the District Court to take additional evidence as to the actual purchase of the tools.

The judgment rendered herein should have contained as one item the sum by which the purchase price of the tools increased between 1946 and 1952.

C. THE DISTRICT COURT ERRED IN EXCLUDING EVIDENCE AS TO THE INCREASED COSTS OF CERTAIN ITEMS.

As previously noted, *supra*, page 8, the District Court refused to permit the introduction in evidence of what plaintiff intended to do in 1946 with reference to the erection of fencing. The record shows that plaintiff was permitted to testify that he intended to grow vegetables on part of the property, and to graze cattle on the remainder, which would require fences and gates to keep the cows out of the vegetables; that he did not actually prepare a plan for the fence in 1946 because he felt that a fence to keep a cow out of a vegetable patch could be built without a blue-

print or technical engineering research, and that in 1953 he prepared such a plan which was offered in evidence as Plaintiff's Exhibit 47 (R. pp. 373, 374). The defendant's objections to receiving this exhibit are quoted *supra*, page 9; the Court itself at pages 375 to 377 of the Record raised other objections, and at page 378 excluded the evidence.

When Mr. Burlake was interrogated at page 504 with reference to the cost of landscaping, land leveling, grading, curbs, fencing, etc., Mr. Abbott's objections (quoted *supra*, page 9) were very general; the Court itself rejected the testimony upon the ground that Mr. Sutro had not testified concerning these items (R. pp. 505, 506), although the reason he had not so testified was because the Court had previously sustained objections to such testimony. The evidence in Mr. Burlake's report as to the increased cost of these items was formally offered in evidence (R. p. 538), and was rejected.

With reference to the farm machinery to be used upon the property, Mr. Sutro testified that he purchased the property to operate it at a profit and for the purpose of growing vegetables for which farm machinery and equipment were necessary. He did not prepare an itemized list in minute detail of such equipment in 1946 because "it would be too simple, when the time came to purchase it, to bother about making up the list right then," but he had since prepared a list (R. p. 362). This list is Plaintiff's Exhibit 44-O for Identification, and was prepared in 1953. Defendant's objection to plaintiff's testimony concerning the list (quoted *supra*, pages 9, 10) was sustained, and plaintiff's offer of proof by Mr. Burlake of the increase in cost of the items referred to therein was rejected (R. p. 538).

Clearly, in each case the Court erred, first, in not even permitting Mr. Sutro to testify to the nature of the fence, the equipment, etc., which was necessary for the proper operation of the

ranch, why it was necessary, when he determined upon its location, or upon the particular item of equipment, etc.; and second, in rejecting evidence of the increased cost of the items upon the ground that there was no detailed evidence as to what was involved. Obviously, at least a certain amount of fence, one or more tractors of some particular type, and certain other minimum items of equipment are necessary to operate any commercial farm.

Moreover, for the reasons presented, *supra*, page 31, with reference to the machine tools, the real question is not, did plaintiff *need* the fence, farm equipment, etc. The question is, had he actually planned to install or purchase these items. If he had, then he has been damaged to the extent of the increase in cost of such equipment. Plaintiff should have been permitted to present evidence concerning his plans, subject to cross-examination by the defendant. The District Court and this Court could then properly determine whether the items concerning which such testimony was offered were proper, and whether the increased cost of such items should have been included in the award of damages.

To exclude all evidence with reference to the items, and thus preclude plaintiff from establishing that they were at all times included in his plans for the development of his property, was clearly error.

D. THE AMOUNT OF THE INCREASE IN COSTS IS CLEARLY ESTABLISHED.

The qualifications of Mr. Burlake of the American Appraisal Company are abundantly clear from his testimony at pages 485-500 of the record. The District Court, in its award allowing damages of \$13,003.00 for the increased cost of the repair shop, implement shed, help house and storage shed, adopted his precise figures as set forth at pages 6A, 9A, 19A and 20A of Plaintiff's

Exhibit 50.* His computations of the increase in cost of the re-

*A word of explanation as to Plaintiff's Exhibit 50 may assist the Court. As we have noted, defendant contended up to and including the session of the trial in July, 1953, that it had a right to pollute Pilgrim Creek (see, for example, its Renewed Motion to Dismiss Plaintiff's Complaint, which was denied in June, 1953, also see R. pp. 244-247). Therefore, even after the defendant ceased to dump the effluent into the Creek in 1952, plaintiff did not feel justified in commencing construction, since he feared that the Government might resume the pollution at any time. Not until the District Court in July, 1953, held that the defendant was liable to plaintiff for any damages he sustained did plaintiff feel justified in proceeding with any improvements.

In the latter part of 1953, in preparation for the trial to determine the exact amount of plaintiff's damages, plaintiff requested the American Appraisal Company to determine the increase in costs of various items between 1946 and July, 1953, the date of the session at which defendant's liability had been declared. As indicated in the letter from the Appraisal Company to Mr. Sutro, dated January 29, 1954, which is contained at the beginning of Plaintiff's Exhibit 50, the original report of the company was completed January 29, 1954. On that very day, however, the District Court, in one of the sessions referred to, *supra*, page 5, held that "the date of the installation of the new project"—i.e., July 21, 1952—"is the date for the fixation of damages" (typewritten Transcript of proceedings, January 29, 1954, p. 56, ll. 2-7; see, also R. pp. 336, 337). Accordingly, plaintiff requested the Appraisal Company to determine the difference in costs between 1946 and July 21, 1952. This second computation was completed February 19, 1954, as indicated by the letter of that date which follows the January 29th letter at the beginning of Exhibit 50. In order to avoid retyping the details of construction on the original pages which compared 1946 costs with 1953 costs, the new figures without the detailed explanations were placed on additional sheets following the 1953 figures. For example, the cost figures for the residence for 1952 were all placed on page 13A following pages 10 to 13 inclusive, which defined exactly what was included in each item. Mr. Burlake testified to the procedure followed at pages 493 to 495 of the Record. The figures used throughout this Brief are the 1952 figures contained in the supplemental pages.

maining items, as set forth in Plaintiff's Exhibit 50 at the pages noted below should likewise be adopted, and the judgment of the District Court should be increased by adding the following items:

Residence building, Page 13A.....	\$18,926.00
Guest house, Page 16A	2,076.00
Sewerage, Page 22A	1,247.00
Fencing, landscaping and miscellaneous improvements, Page 23A	5,325.00
Domestic water supply, Page 24A	2,740.00
Irrigation work, Page 27A	16,280.00
Irrigation pumps, Page 29A	1,831.00
Shop machinery and equipment, Pages 32A and B..	14,866.00
Farm machinery and equipment, Page 35A.....	10,125.00
Automobiles and trucks, Page 36A.....	5,270.00
TOTAL	\$78,686.00

II.

PLAINTIFF'S LOSS OF RENTAL VALUE WAS IN EXCESS OF \$55,000.00.

The District Court computed plaintiff's loss of rental value as follows:

"The items included in the award are as follows:

"Loss of rental value on 56.55 acres at \$60.00 per acre for a six-year period, 1946 to 1952.....	\$20,358.00
Loss of rental value on 25.80 acres at \$40.00 per acre for a six-year period, 1946 to 1952.....	6,192.00
Loss on rental value on 18 acres at \$10.00 per acre for a six-year period, 1946 to 1952.....	1,080.00
TOTAL	\$27,630.00
Estimated crop receipts during six-year period, 1946 to 1952	\$ 8,711.64
Total Loss of Rental	\$18,918.36"

R. p. 45.)

The foregoing computation is erroneous because it is computed (a) on too small an acreage, and (b) at too low a rental per acre.

A. THE ACREAGE FIGURES USED BY THE DISTRICT COURT WERE TOO SMALL.

The District Court's judgment is based entirely upon the testimony of Mr. Goode, defendant's expert witness, who testified that he did not include "18 acres of alkali ground in the flat, which is physically capable of irrigation, but not included within the above irrigated land classification due to its alkaline condition." (R. p. 567.)

This area should have been included. Clarence P. Tedford, who was for many years Chief of the Soil Conservation Service in Fallbrook, within which District plaintiff's land is located, and who had been on plaintiff's property numerous times and who had made a survey of soil types and had prepared a soil map of the property (R., pp. 80, 81; Plaintiff's Exhibit 33), testified that the 18 acres which had been alkali by an excess of water (which excess incidentally was caused by the negligence of defendant in discharging silt into Pilgrim Creek, as alleged in plaintiff's second cause of action) could be drained (R. p. 93). He further testified that this operation "would probably take a year; maybe two years" and that "I don't think your alkali conditions are going to be too bad, too hard to correct them." (R. p. 94.)

Mr. Sutro testified that he had always intended, and still intends, to reclaim this land (R. p. 166). The time for reclamation now is obviously at least as long as the time for reclamation in 1946 would have been had the Government's tortious conduct terminated at that time. Therefore, while the 18 acres of alkali land could not have been used for vegetables for X months

during the period of reclamation, it will now take X months in the future to make it usable, and the period of use of which plaintiff is deprived is therefore the same as with the other land. Since no claim is being made against the Government for the cost of reclaiming this land (except for the *increase* in cost of installing the sump and drainage system necessary for the reclamation; the sump has been installed since the trial) it is no concern of the defendant whether the cost of reclaiming the land is, or is not, economically justifiable. (See, in this connection, the argument under heading I, B, 6 *supra*, page 31, to the effect that plaintiff was entitled to recover for the machine tools even though those tools might not have been purchased by the so-called "average man"). Hence, Mr. Goode's testimony that the cost of reclaiming the land would, in his opinion, be high is immaterial.

Moreover, the rental value of vegetable land with soil of the quality of this soil is so high in this vicinity (see discussion *infra*, pages 43, 44 of testimony of the witnesses as to value) that the cost of reclaiming the land would be justifiable even though it was several times as much as it actually is.

It follows, therefore, that the irrigable acreage to be considered is approximately 100 acres from 1946 to 1950, instead of the 82 acres considered by the District Court.

In 1950, in an effort to mitigate damages, plaintiff dug a second well in a different location from that of the well on the premises at the time he purchased the property, hoping to obtain an unpolluted supply of water so that he would be able to occupy his ranch; at the first trial it was determined that this well, too, was polluted because of the defendant's acts (see R. p. 201), and hence the water could not be used. However, the evidence showed that the added supply of water, if unpolluted, would have permitted the irrigation of an additional 50 acres of land which had never before been irrigated. (See R. pp. 187-189; Plaintiff's Ex-

hibits 41, 42.) Although counsel for defendant cross-examined plaintiff at great length, and inquired about the capacities of the wells (see, for example, R. pp. 401-403), the testimony as to the adequacy of the water supply to irrigate the additional acreage is uncontradicted; and the Government on this appeal has conceded liability for polluting the supply. Therefore, the District Court further erred in failing to include the additional 50 acres of land for the years 1951 and 1952 in its computation of damages.

B. THE RENTAL VALUE PER ACRE ALLOWED BY THE DISTRICT COURT WAS INADEQUATE.

Mr. Goode testified to the valuations given by the Court in its award above quoted, but did not place any value upon the loss of rental of the additional 50 acres above referred to, and considered the land temporarily unusable due to alkali conditions caused by the high water table only in its then condition, without allowance for the increased rental value which it would have had as soon as the alkali had been removed.

Mr. Anderson, plaintiff's expert witness, testified that the rental value for all of the bottom land and the mesa land (the 100 acres above mentioned, including the alkali land) was \$100 per acre per year for the entire period (R. pp. 254, 255), and that after the year 1950 the additional area of 50 acres above mentioned with an unpolluted water supply would have had a rental value of \$75 per acre per year (R. p. 255). The difference in value was caused, in part, by soil conditions and in part by the fact that the latter land, unlike the first 100 acres, had not previously been irrigated and was rolling in character so that some additional expenditures would be required. \$100.00 per acre for 100 acres is \$10,000 per year or \$60,000 for six years; \$75.00 per acre on 50 acres is \$3,750.00 per year, or \$7,500 for two years.

The total rental value of the property with an unpolluted water supply would therefore, on Mr. Anderson's figures, be \$67,500.

Mr. Sutro testified that he had investigated rentals in the general area of his property (See, *infra*, pages 48 and 49), and basing his testimony upon his own knowledge of his land and upon this investigation testified that the rental value of the property with an unpolluted supply would be \$70 per acre in 1946, \$75 per acre in 1947, \$85 per acre in 1948, and \$100 per acre in 1949, 1950, 1951, and 1952. He applied these values to the 100 acres prior to December, 1950, and to the 150 acres after January, 1951. The total rental on these figures, on one hundred acres up to 1950 and on one hundred and fifty acres for 1951 and 1952, would be \$63,000.

1. *The Valuations of Mr. Anderson and Mr. Sutro Should Be Accepted.*

(a) *Mr. Goode's appraisal is weak and should not be relied upon.*

Mr. Goode's appraisal should not be relied upon for the following reasons:

(1) Many pages of the record are devoted to a lengthy statement by Mr. Goode as to the extent of his investigation. However, most of his work was along channels which could not assist him in forming an opinion as to the fair rental value of the property. For example, he secured an abstract from Land Title Insurance Company, consisting of some 40 pages of entries (R. p. 598), and examined "the deeds that I cared to inspect" (R. pp. 553, 554). There were about 40 of these deeds (R. p. 599), al-

though each page of the abstract had some 50 or 60 entries (R. p. 598) and Mr. Goode never explained the process he used in selecting the particular deeds for further examination. He also obtained offerings or list prices on other properties from various real estate dealers (R. pp. 562, 563, 599). From this information he endeavored to determine the sales prices of the various properties considered. This work might assist him in forming an opinion as to the market value or the sale price of the Sutro property, but it would in itself give him no information as to the rental value of that or any other property, and he admitted that "there wasn't a single lease recorded" in the abstract which he examined (R. pp. 554, 604).

However, Mr. Goode testified that he determined the ratio between sales price and rental price (R. p. 561), and that the ratio was 10 to 1 (R. p. 581). The time Mr. Goode spent in obtaining this evidence and in preparing the elaborate map, Defendant's Exhibit DD, is an indication of the importance he placed upon this portion of his investigation, and the extent to which his opinion was based upon it. Yet, on cross-examination, he admitted that he had only two instances in which he had both a lease price and a sales price for the same property, one instance in which he had an actual lease and an offer to sell, and one instance in which he had a sales price on an entire 4,000 acre parcel which included three separate leases in addition to much other property (R. pp. 607, 608). No one, however expert he may be, can form a general rule of any validity based upon three or four isolated cases, and the fact that Mr. Goode believed that he had sufficient information to enable him to do so and relied upon such a presumed rule in itself detracts from the value of his testimony. Particularly is this true when he stated that sales prices might be affected by many factors, such as closeness to highways and market centers, which would not affect rental values for agri-

cultural purposes (R. p. 603). An opinion based in part upon a line of reasoning such as the foregoing is not entitled to great weight.

(2) Twenty leases, or almost two-thirds of those considered by Mr. Goode, involved leases by the Government of portions of Camp Pendleton property not used for military purposes. These are shown by the numbers L-9 and L-11 to L-29 inclusive on Mr. Goode's Exhibit, Defendant's Exhibit DD (R. p. 608). Mr. Goode testified that Camp Pendleton extended some 20 miles north of plaintiff's property and that many of the leases examined by him affected property too distant from plaintiff's property to be shown on Exhibit DD (R. p. 600). Moreover, Mr. Goode admitted on cross-examination that these leases all had clauses which (1) restricted the amount of water which the lessees could use, and (2) gave the Government the right to cancel them upon thirty days' notice without payment for any crop losses sustained by the lessees as a result of such cancellation! (R. p. 609). Mr. Goode further admitted that tenants under these leases would sometimes rent 3 or 4 acres of land, and only irrigate 1 acre, putting the total water allotment for 3 or 4 acres upon 1 crop to grow the crop, and that this would affect the rental value of the property (R. p. 609). Even with these restrictions, however, 8 of the 16 Camp Pendleton leases for irrigated crops (Frazee, 3 leases; Singh, 2 leases; Beggs, 2 leases; and Rathwish) provided for rent at the rate of \$45 per acre; one (also Singh) for a rental of \$41.20 per acre; two (another to Beggs and 1 to Boehm) for \$40 per acre; three (Castro, Contreras and another to Beggs) for \$35 per acre; one (another to Boehm) for \$34 per acre; while the lowest rent of the entire 16 (another lease to Boehm) was \$25 per acre (R. pp. 618, 619). Mr. Goode frankly stated:

"However, I can state this, that on the Pendleton leases that I considered that every one of them was short of water . . ." (R. p. 622).

Yet these were the leases which he used in computing the rental value of plaintiff's land, on which the plentiful supply of water was not even challenged!

Mr. Goode conceded that the cost of water would have to be added to his rental figures and that he did not know what that cost was (R. p. 619). Even without adding this amount to the rental, under 8 of the 16 Camp Pendleton leases for irrigated land, the rental price paid per acre of land for which an adequate supply of water would be available (one-third of the acreage under lease because of the water restrictions) on Mr. Goode's figures would be \$135.00 per acre (three times \$45). The lowest rental of vegetable land at Camp Pendleton *subject to a thirty-day cancellation clause* would be \$75 per acre (three times \$25). We submit that, when the amounts testified to by Mr. Goode are actually paid for vegetable land subject to the restrictions enumerated, the fair rental value of plaintiff's land without such restrictions and with an adequate supply of up to six acre feet of water per acre per year at low cost (see discussion of testimony of Mr. Anderson, *infra*, page 47) is obviously more than \$60 per acre, the figure advanced by Mr. Goode and adopted by the Court for 56.55 acres, and is far in excess of \$40 per acre, the figure adopted by the Court for 25.80 acres, or \$10 per acre, the figure adopted by the Court for 18 acres of the alkali land.

(3) Mr. Goode inquired about rentals at the Pankey Ranch, which he admitted was 10 miles from Mr. Sutro's property (R. p. 601), and at other points too distant to be shown on the map (Defendant's Exhibit DD) as shown by the location of the numbers designating these leases at the extreme edges of the map,

with arrows pointing in the directions of the property. (R. pp. 599, 600) However, he was not aware (R. p. 629) of the rentals paid by Mr. Alvarado, Mr. Delphy and the other individuals whom Mr. Sutro contacted (see *infra*, page 48), who rented land in the San Luis Rey, Vista, and Oceanside area, within a five-mile radius of the Sutro property (R. p. 601), including two leases on property which bordered Foss Lake on the side opposite Mr. Sutro's property (Murillo, R. p. 328; Faucett, R. p. 330). In other words, he missed the most important sources of information, and depended, for the most part, upon leases of land which were not as comparable to Mr. Sutro's land as were the sources relied upon by Mr. Anderson and Mr. Sutro.

(4) Even more damaging to Mr. Goode's testimony was his admission that he would not change his opinion even if he knew that land in the immediate vicinity of Mr. Sutro's land was renting, and had rented, for sums in excess of \$100.00 per acre (R. pp. 629, 630). The fact that such prices had been paid, and were being paid, was most material to a determination of the rental value of the Sutro property, and would be wholly inconsistent with Mr. Goode's appraisal of \$60.00 to \$65.00 as the fair rental value, since Mr. Goode admitted that the soils in the portion of the Sutro property which he classified as irrigable were good. (He classified much of it, for example, as Hanford sandy loam (R. p. 614), one of the finest soils in California. This soil is the only soil in Western San Diego County which is given a rating of 100 by Dr. R. Earl Storie in his "Classification and Evaluation of the Soils of Western San Diego County" (University of California, College of Agriculture, Agricultural Experiment Station, Berkeley, California, Bulletin 552, June, 1933, page 32, referred to R. pp. 614, 615). It is in effect the yardstick by which other soils are measured. And Mr. Goode admitted that Dr. Storie was

"the best soil man in the United States," and that he would "not question anything that Dr. Storie says" (R. p. 615).

(5) Mr. Goode admitted that the cost of water was a vital factor in determining rental values (R. p. 610), yet he had not even endeavored to ascertain the cost of water on either the Sutro property or the other properties whose rental values he did ascertain (R. p. 611). He conceded that the Sutro property had an adequate supply of water, and did not challenge Mr. Sutro's or Mr. Anderson's testimony to that effect, but made no investigation as to the adequacy of water supplies of the other properties—although, as has been noted, he admitted that the supply for the Camp Pendleton leases, upon which he relied so heavily, was definitely inadequate.

(6) He admitted that the cost of labor was also an important factor in determining rental value (R. p. 610), yet he did not determine the labor costs on the various properties he considered (R. p. 611).

(7) He admitted that the rental value of any property would be greater if it had a system including a storage dam and reservoir which would enable the entire property to be irrigated rapidly in time of dry, hot winds than it would be if there were no such system (R. p. 611), yet he did not determine whether the pipe sizes and storage capacity of the irrigation systems installed upon the rental properties which he considered were comparable to Mr. Sutro's system (R. p. 611).

(8) Mr. Sutro had prepared plans for a complete irrigation system, including a dam and two reservoirs which would enable him to irrigate the property in the most economical method pos-

sible, using large volumes of water for relatively short periods of time (See R. pp. 159, 160, 222-225, 233-235). (The 6,500,000 gallon dam and 977,000 gallon reservoir are now completed.) However, Mr. Goode, in forming his opinion as to the rental value of the Sutro property, considered its value with the ancient system installed by Mr. Sutro's predecessors and not with the new system including the dam and reservoir (R. pp. 612, 613). It is apparent from the exhibits and correspondence, much of it written in 1946, that the improvements were to, and would have been, made in that year, and at costs then prevalent, but for defendant's acts, and that the rental value of which Mr. Sutro has been deprived is the rental value of the property as so improved. In this connection, it should be noted that plaintiff is not making any claim for the rental value of the buildings to be erected upon the property, but merely for the rental value of the land with the efficient irrigation system Mr. Sutro would have installed but for the pollution.

(b) *Mr. Anderson's Testimony Is Entitled to Great Weight.*

Mr. Anderson has had a long experience in actual selling and leasing of property in the San Luis Rey Valley. He is familiar with leases in the immediate vicinity of the Sutro property, including the Davies property which is "on the same road going up to the Sutro property" (R. p. 266), the Stokes property (R. p. 265) which is "right below" the Sutro property and adjoins Foss Lake (R. p. 268), the Winston property (R. p. 266) which is 4 or 5 miles from the Sutro property (R. p. 269), and other properties much closer to Mr. Sutro's property than the lands considered by Mr. Goode. Mr. Anderson confined his investigation to comparable properties, and did not spend his time obtaining information with reference to properties which were not comparable,

which information could only confuse the issue. His testimony was based, not upon rentals of Camp Pendleton property subject to cancellation clauses and restricted water rights, requiring the leasing of three acres to obtain enough water for one acre, nor upon rentals on property 10 miles from the Sutro property, but upon the properties most likely to be comparable to the Sutro property.

Neither did Mr. Anderson attempt to base his opinion upon an alleged co-relation between sales prices and rental prices. Much of the cross-examination (see R. p. 263) was directed to his information as to the sales prices of specific pieces of property—presumably the sales investigated by Mr. Goode. For the reasons already stated, information as to such sales would not be a benefit in forming an opinion as to rental values, but would only tend to obscure the true issue.

Mr. Anderson, in arriving at his opinion, considered the all important matter of water costs—and *his assumptions in this connection stand unchallenged in the record*. He took into consideration the uncontradicted testimony that the prices paid for water by adjoining owners ranged from \$10.00 to \$25.00 per acre-foot (R. p. 274), while the water costs on the Sutro property would be only \$4.00 per acre-foot because of the efficiency of the Sutro irrigation system (R. p. 274). Mr. Sutro testified that the pumping costs would be \$1.58 per acre-foot for the approximately 100 acres of lower land, and \$2.77 per acre-foot average for all the land, including the high land which he would have irrigated after 1950 (R. p. 173). This testimony stands without contradiction in the record, although the depth of the draw-down in the wells, the height to which the water was to be pumped, the size of the pipes and even the specifications for the pumps were all available to defendant so that if plaintiff's computations were incorrect that fact could readily have been established (see

Plaintiff's Exhibits 41 and 42). (This testimony, of course, indicates why plaintiff wished to install this particular system because, as he testified, the use of small pumps operating 24 hours a day, filling reservoirs which could later release large quantities of water rapidly whenever needed, resulted in outstanding operating economies. (See R. pp. 159, 160, and 234, 235.)

Mr. Anderson recognized the fact that a rental of \$100.00 per acre for land, coupled with three to six-acre feet of water per acre at \$4.00 or less per acre-foot (making the total cost for land and water \$112.00 to \$124.00 per acre, depending upon the amount of water used), is more attractive to a tenant than a rental of \$85.00 an acre, coupled with three to six-acre feet of water at \$10.00 to \$25.00 an acre-foot (making the total cost for land and water \$115.00 to \$235.00 per acre, depending upon the amount of water and the price per acre-foot) (R. pp. 273-275). The logic behind this reasoning is uncontrovertible—and requires the conclusion that the reasonable rental value of plaintiff's property was, as Mr. Anderson testified, at least \$100.00 per acre per year.

(c) Mr. Sutro's Opinion Is Likewise Entitled to Respect.

Plaintiff himself testified as the owner of the property as to its rental value. The method which he followed in forming his opinion was very simple. He asked a number of neighboring tenants and landlords what rental they were paying or receiving for their property (R. pp. 322ff); examined their leases personally (R. p. 330); ascertained the cost of their water (R. p. 333); made allowances for differences in water costs and other possible differences between their properties and his (R. p. 335); and then determined the comparable value of his own property (R. p. 335). Defendant did not challenge the method employed by Mr. Sutro,

nor did it indicate any weaknesses or errors therein. It should be noted that, in making his estimate, plaintiff charged his own land with water costs on twice the amount of water which he charged to the other properties (R. p. 335).

Mr. Sutro's familiarity with power costs, pumping systems, the most efficient manner of irrigating property, the water requirements of various crops, and the other factors which should be considered in forming an opinion as to the rental value of property, as shown by all of his testimony, give to his opinion a weight far greater than that which would normally be given to the opinion of a landowner.

To summarize the testimony upon this point: Mr. Goode's opinion was distorted by a consideration of immaterial and misleading factors, and was not based upon the directly material and important considerations. Mr. Anderson and Mr. Sutro relied upon directly comparable and relevant factors, and took into consideration water costs and rentals actually paid in the general and immediate vicinity. The judgment of the District Court should have been based upon their testimony, and the District Court erred in not finding in accordance with their testimony that the rental value of the property for the period in question with an unpolluted supply was between \$63,000.00 and \$67,500.00; the figures to which Mr. Sutro and Mr. Anderson, respectively, testified.

C. THE DISTRICT COURT'S COMPUTATION OF DRY FARM RENTAL WAS INCORRECT.

Mr. Anderson testified that with a polluted supply the greatest net income on the property would be received from dry-farming barley on a share-crop basis of one-quarter of the crop. The average price per sack from 1946 to 1952 was \$2.90; the

high productivity of the soil would produce 15 sacks to the acre, netting the owner $3\frac{3}{4}$ sacks to the acre, or \$10.87 per acre per year (R. p. 257). For 100 acres, this would be \$1,087.00 per year, or \$6,522.00 for six years, or \$7,609.00 for seven years. On the 50.72 acres hereinabove referred to, which would have been irrigated from the second well if the supply of that well had not been polluted during the years 1951 and 1952, the receipts would be \$1,102.64. The total dry farm income would thus be \$7,623.64 for six years, or \$8,711.64 for seven years. However, the District Court apparently by reason of a mathematical error, computed the estimated receipts "during six year period, 1946 to 1952" at \$8,711.64 (R. p. 45). Only \$7,623.64 should be deducted from the rental which would have been received for the property with an unpolluted supply, even assuming, as the District Court did, that plaintiff should be charged with the theoretical maximum return for a dry farm operation.

Deducting this figure of \$7,623.64 from the actual rental value of the property with an unpolluted supply of water (\$67,500 according to Mr. Anderson, *supra*, page 39, and \$63,000 according to Mr. Sutro, *supra*, page 40) the actual net loss of rental suffered by Mr. Sutro for the six-year period, 1946 to 1952, was between \$59,876.36 and \$55,376.36, and the judgment of the District Court should have included this amount.

III.

THE DISTRICT COURT ERRED IN EXCLUDING EVIDENCE AS TO EXPENDITURES MADE BY PLAINTIFF IN AN EFFORT TO MITIGATE DAMAGES.

The general rule with reference to mitigation of damages is stated as follows in *Kleinclaus v. Marin Realty Co.*, 94 Cal.

App. 2d 733 (hearing denied by the Supreme Court) at page 739:

"The reasonable cost involved in mitigating damages is always recoverable, provided it does not exceed the damages prevented or reasonably anticipated. (4 Rest. Torts, sec. 919; 15 Am. Jur. Damages, Sec. 27, p. 423, Sec. 147, pp. 554-555; 8 Cal. Jur., Damages, sec. 43, p. 783.) It is obvious that one by his wrongful act cannot cast on another the necessity of expending money to prevent or mitigate damages and escape liability for the reasonable cost thereof."

This same rule is stated as follows in 25 C.J.S. at page 531:

"Legitimate expenses incurred in a prudent endeavor to reduce the damages, even though the intended object was not accomplished, may be recovered."

"As a general rule, a party is entitled to all legitimate expenses that he may show to have been incurred by him in an honest endeavor to reduce the damages flowing from or following the wrongful act. . . . Neither does it affect the right to recover that the object intended was not accomplished, provided the expenses were reasonably and prudently incurred. . . ." (Italics added.)

As we have noted, *supra*, pages 19, 20, plaintiff was expressly admonished by the Government, in writing, to mitigate damages in accordance with this principle of law. He endeavored so to do by performing work upon the property to prevent erosion; he was obliged to store equipment which would later be required; he was forced to take certain trips in connection with the contentions of the Navy Department, etc. Under the rule above noted, plaintiff was entitled to recover sums reasonably expended by him

in such an effort. Counsel for plaintiff at page 398 of the record stated:

“Mr. Cranston: Your Honor, for the sake of the record I would like to ask Mr. Sutro certain questions as to expenses which he incurred.”

The Court then said:

“The Court: Why don't you make an offer of proof, instead of asking him, because it will take up time in cross-examining him, and all of that.”

Plaintiff then offered to prove that he had been forced to expend \$37,382.85 for items specifically referred to in the offer, from which no permanent benefit was obtained. The defendant's objection, quoted *supra*, page 11, was sustained.

The next day, plaintiff returned to this point with reference to one of the items above mentioned, and asked Mr. Sutro specifically how much he had spent for labor in preparing to grow crops in 1946 (R. pp. 468, 469). The defendant again objected “on the grounds previously stated,” and the objection was sustained.

Here, again, plaintiff should have been permitted to introduce evidence as to the exact expenditures made. To cite an example, because of the hilly nature of portions of the property, plaintiff was obliged to take steps to prevent erosion during the period the land could not be used for growing vegetables. If such steps had not been taken, there would have been permanent damage to this portion of the land for which the defendant would be liable. Money spent by plaintiff for labor in discing the land, etc., for seeds, sprays, and fertilizers to prevent this erosion was

included in the offer of proof. Moreover, the Court refused to permit plaintiff to answer the specific question as to how much he had spent for such labor in 1946. The Court should have permitted plaintiff to show exactly what was done, and how much he spent; then it could have determined whether the expenditures were justified under the rule with reference to mitigation of damages above set forth. To exclude evidence of *all* expenditures made by plaintiff made it impossible to determine whether the expenditures, or any of them, came within the rule permitting their recovery.

CONCLUSION

All the testimony reveals, and the District Court expressly found (Finding of Fact No. 9, R. pp. 39, 40), that plaintiff had at all times cooperated with the defendant and done everything he could to remedy a situation which was caused by the needless, wrongful conduct of the defendant. Plaintiff was willing to do anything to develop and use the property provided that he received some assurance from the Government that the increased costs incurred by him as a result of whatever action he took would not be wholly wasted because of some subsequent action of the Government. Whenever he was asked to cooperate with some definite plan of the Navy, he endeavored to assist.

The defendant, however, although it alone was the wrongdoer, and although it now concedes that it alone was wholly responsible for the situation, and although it could have remedied the situation at any time, did not actually do anything even to alleviate the situation until 1952—two years after the complaint had been filed in this action.

As a result of the defendant's wrongful and deliberate actions, needlessly continued over a period of many years, plaintiff, who

himself had done no wrong, has been damaged very seriously financially, in addition to suffering losses upon which no monetary value can be placed. The relief afforded plaintiff by the District Court is wholly inadequate. Plaintiff asks merely for compensation for a portion of the damage he has actually suffered.

The judgment of the District Court on the measure of damages should be reversed and, on the basis of evidence already in the record, plaintiff should be awarded damages of \$58,876.36 for loss of rental value of the property, instead of the \$18,918.36 allowed by the District Court; and damages of \$70,969.00 for increased costs of the improvements as to which evidence was actually admitted, instead of \$13,003.03 as allowed by the District Court. The case should then be remanded to the District Court with directions to that Court (1) to receive the evidence which was offered by plaintiff and rejected as to the increased costs of the fencing, farm machinery, etc., and as to the sums expended by plaintiff in an effort to mitigate damages, and (2) to enter judgment for plaintiff for the additional sums the Court determines upon the basis of such evidence are necessary to compensate plaintiff (a) for the increase in cost of such items, and (b) for the amounts necessarily and reasonably expended by plaintiff in an effort to mitigate damages.

Respectfully submitted,

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No. 14588

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant and Cross-Appellee,

vs.

ADOLPH G. SUTRO,

Appellee and Cross-Appellant.

ANSWERING AND REPLY BRIEF OF APPELLANT AND CROSS-APPELLEE.

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plaintiff in an action brought by him for damages allegedly caused by the negligence of defendant's employees while acting within the scope of their employment. [R. 4, 9-11.] Jurisdiction to entertain the action was conferred upon the District Court by 28 U. S. C., Sec. 1346(b) (which section is a part of that Act commonly known as the Federal Tort Claims Act). Jurisdiction to entertain this appeal is conferred upon this Court by 28 U. S. C., Sec. 1291. Defendant's Notice of Appeal from the Judgment appealed from was filed on September 23, 1954.

Questions Presented.

1. Whether a party purchasing land in 1946, who decides not to improve that land until 1952 because of a polluted water supply during that period, may recover against the party causing the pollution for:

(a) the difference in the cost of effecting the improvements in 1946 and 1952.

(b) the difference in the 1946 and 1952 purchase price of certain tools and equipment which the land purchaser might have purchased in 1946, but did not because of the polluted water supply.

2. Whether the District Court erred in the amount of its award for plaintiff's loss of rental value for the period 1946-1952 because of the pollution.

3. Whether the District Court erred in excluding evidence of expenses allegedly incurred by plaintiff in what plaintiff chooses to call an effort to mitigate damages.

Summary of Argument.

The District Court properly refused to allow a recovery for the increased cost of effecting certain improvements upon this land because such an item under the circumstances and facts surrounding this case is too far removed and unrelated to the defendant's tort and is otherwise speculative in nature. The District Court's award with respect to loss of rental was correct and is supported by the evidence adduced at the trial of the action. No error was committed by the District Court in excluding evidence offered by the plaintiff relating to expenses incurred by him in what he calls an effort to mitigate damages. These expenses could not properly be recoverable in the action and hence, the evidence as to them was properly excluded as being immaterial.

ARGUMENT.

I.

Recovery Should Not Be Allowed in This Case for Increased Costs.

1. No Authority Known to Defendant Supports Any Recovery in This Case for Increased Costs.

In its opening brief as appellant, defendant attacked that portion of the District Court's award allowing the plaintiff a recovery based upon the increased cost of building a repair shop, implement shed, help house and storage shed. Defendant's position in making that attack was that recovery for an item such as increased building costs was improper because that item was remote, speculative and too far removed from the defendant's tort. For these same reasons defendant takes the position in its answering brief that the District Court correctly refused to allow recovery for the other items for which recovery was sought.

Defendant could find no case in California or elsewhere dealing with the precise question of whether or not recovery can be had for an item such as increased costs in a tort case involving these or similar facts. The general rules applicable in California and elsewhere are however well established. They are that while a party should be compensated or made whole for his loss, no recovery should be had for damage not proximately caused by the tort-feasor or for any damage which may be classed as remote or speculative.

Calif. Civ. Code, Sec. 3333;

Wells v. Lloyd, et al., 6 Cal. 2d 70, 56 P. 2d 517 (1936);

Ramsey v. Penry, 53 Cal. App. 2d 773, 128 P. 2d 399 (1942);

25 C. J. S., Damages, Secs. 17, 18 and 26.

Plaintiff relies upon *California Orange Co. v. Riverside Portland Cement Co.*, 50 Cal. App. 522, 195 Pac. 694 (1920), as justifying that portion of the award heretofore challenged by defendant. (Pltf. Op. Br. p. 17.) However, an analysis of the facts of that case show no similarities to the factual basis upon which plaintiff seeks to recover for increased costs in this case.

The cement case was a tort action by an orange grower against a cement company which, by emitting dust from its plant injured the grower's trees and caused a decrease in crop yield. A recovery was allowed in that case for the (1) loss of crops; (2) for increased labor to care for the land because of the dust; and (3) for injuries to the trees. In that case the grower, as the injured party, had property at the outset which was damaged, *i. e.*, the trees. In so far as increased costs in this case are concerned, plaintiff had no property to start with. In that case the defendant acted so as to injure that which existed. Plaintiff here could have built at will and could have purchased equipment at his pleasure without interference from the defendant. The recovery in that case was based upon acts which had already been completed and as to which there was no conjecture and little speculation. A recovery here based upon increased building costs and the increased cost of equipment would be based upon little more than the plaintiff's statements as to what he would have done had the time been ripe for him to do so. In the cement case there was a direct causal relation between the tortfeasor's acts and the injury for which recovery was al-

lowed. Here, as to increased costs at least, there is no such relationship. Defendants polluted a stream, the water from which could have been used by plaintiff to irrigate crops. This water was indeed lost to the plaintiff by the tortious conduct of the defendant and because of that the value of plaintiff's land was at least temporarily decreased. Defendant has no quarrel with a recovery for loss in the value of the land during the period of pollution, but defendant should not be made to pay because plaintiff chose not to carry out his rather grandiose plans for improving this land.

2. Recovery Was Properly Disallowed for the Increased Cost of Erecting the Residence and Guest House and of Installing the Domestic Water Supply System and Sewage System.

Recovery for the increased cost in effecting these improvements was denied by the District Court on the ground that recovery for such an item would fall into the categories of uncertainty, remoteness, infeasibleness and unnecessary [R. 46]. No specific authority has been found for this conclusion. However, upon general principles of tort recovery it is correct and should be adopted by this Court.

Defendant's main ground of attack upon allowing any recovery based upon increased costs of effecting these improvements is founded on the legal concept of proximate cause. It is true that plaintiff may have desired to erect the buildings and install the systems when he purchased the land, and as plaintiff has pointed out, plans for the buildings prepared in 1946 were introduced into evidence [R. 354, 357]. However, that plaintiff did not go ahead in 1946 at a time of lower construction costs was not the

fault, in the legal sense, of the defendant. Had plaintiff wished to build in 1946, he could have done so without interference from the defendant. Defendant's activities did result in the pollution of the stream riparian to plaintiff's land. By reason thereof, the value of plaintiff's land for agricultural purposes was decreased. But that factor bears too little relation to the increased costs of effecting these improvements to permit recovery therefor in a tort action.

3. Recovery Was Properly Disallowed for the Increased Cost of Installing the Irrigation System.

As to this item the defendant takes the same position it has taken with respect to those items just mentioned, namely, that it was not the proximate or legal cause in this, a tort action of any increase in the cost of installing the same. There is an additional circumstance to be considered with respect to this item. That is, that although plaintiff may have desired to install the particular system for which he claims recovery in 1946, he had no plans and specifications prepared for its installation until 1953 [R. 147, 151, 155-156]. There is thus added to the problem of recovery for this item an element of speculation not to be found in dealing with the residence and guest house.

In order to properly consider this element of speculative-ness, reference should be made to plaintiff's theory of recovery. It is that he would have installed this irrigation system in 1946 had the water not been polluted, but had to wait until 1952 because of the pollution and thereby is entitled to recover the difference in cost. Yet, admittedly (Pltf. Op. Br. p. 25), no plans were prepared for the irrigation system in 1946. All that any award

for this item could be based upon is plaintiff's testimony as to what he would have done. It is submitted that to allow recovery for this item would be to introduce into the law of damages an element of uncertainty and speculation not warranted either by precedent, principle or reason.

4. Recovery Was Properly Disallowed for the Increased Cost of Acquiring Tools.

Defendant was not the proximate cause of this item and because the only evidence that these specific tools would have been purchased in 1946 was a list prepared in 1953, too much speculation would be present in granting a recovery for any increases in cost.

Certainly there is less relation between the defendant's tort and this item than there is with respect to almost any of the other items for which the plaintiff seeks recovery. The fact that plaintiff is a man who all of his life has used tools and who has made inventive contributions to our society is certainly a fact of merit. But defendant fails to see how this fact can have any relevance on the question of proximate cause. It is inconceivable that the law should impose upon one who pollutes a stream riparian to agricultural land the increased cost of purchasing machine tools to be used in the furtherance of such inventive endeavors, no matter how meritorious the results therefrom might be. In addition, for the same reason applicable to the irrigation system, namely, that the list of tools was not prepared until 1953, there would be too much speculation inherent in permitting a recovery for such an item wholly apart from the question of whether or not the defendant was the proximate or legal cause of these price increases.

5. The District Court Properly Excluded Evidence as to the Increased Cost of the Erection of Fencing and the Acquisition of Certain Farm Machinery.

The District Court's theory as to what damages could be recoverable in this case is most adequately reflected at page 386 of the record:

"The Court: Whatever he spent, whatever he has to spend now or after the nuisance was abated, in other words, after the water was not contaminated by this noxious affluent, if there is an increase in the cost of buildings that were necessary to do the job, I think the additional cost over the estimate which he has as indicated by the plans, drawings and specifications is the measure of damages in the case."

In all probability the District Court excluded evidence of the increased cost of fencing and of acquiring certain farm machinery because no plans, drawings or specifications for these items were prepared until 1953 [R. 363, 374]. Of course, on this appeal and at the trial of the action defendant has taken the position that no recovery can be had for any increased costs because defendant was not the proximate cause of these injuries, if such they be, and they are otherwise too speculative to permit of recovery. As to the excluded evidence now under discussion, however, the District Court and defendant do not disagree. Under the law, as found in the requirement of proximate cause and of certainty in the ascertainment of tort damages, no recovery may be had for items not made specific and definite until after the tort had ceased to exist. Therefore, such evidence, both under the theory of the District Court and of the defendant, is immaterial and hence was properly excluded in the Court below.

6. Because of the Nature of the Theory Upon Which Plaintiff Seeks to Recover, the Fact That the Stream Was Polluted and the Growing of Edible Vegetables Had Been Prohibited Before Plaintiff Purchased the Land, Should Be Considered as Going to the Question of Whether Any Recovery, Except for Decrease in Land Value, Should Be Allowed at All.

As mentioned by defendant in its opening brief (p. 8), there is nothing in the record now before this Court to show that the plaintiff had knowledge of the polluted condition of the stream before he purchased the land. In its opening brief defendant urged this Court to consider this circumstance because "it is inconceivable that a man of appellee's [plaintiff's] business experience and acumen would not know of these facts at the time he purchased the land. (Deft. Op. Br. p. 8.) Defendant no longer believes it necessary to ask this Court to indulge in an assumption because plaintiff has conceded that testimony elicited at the trial of this action, though not a part of the record now before this Court, established that plaintiff was aware of the stream pollution when he purchased the property. (Pltf. Op. Br. p. 13, footnote.)

This fact, *i. e.*, plaintiff's knowledge of pollution of the stream is material to the question of damages especially when the nature of plaintiff's theory of recovery is kept in mind. Put simply, plaintiff says he bought the land intending to farm it intensively and intending to use stream water to irrigate it with, and operate profitably, and because he couldn't do so he says he could not carry out his plans and should be reimbursed by the defendant. Yet he knew at the time he purchased the land that the stream was polluted, and in that condition could not be profitably used for irrigation purposes. Defendant submits that

plaintiff's intentions, in view of his knowledge of the pollution, were not reasonable and should not be allowed to form the basis for any recovery.

Plaintiff is apparently taking the position on this appeal that his knowledge of the polluted condition of the stream is not important because he did not know that a well on the land was polluted or would soon be so, and he intended to use water from this well for domestic purposes (Pltf. Op. Br. p. 13, footnote). Defendant fails to see the merit in this distinction, if one there be. The *very gravamen* of plaintiff's case seems to be that plaintiff could not use his land because the stream was polluted and yet he knew of this when purchasing the land. The relevance of the well condition is dim indeed.

II.

The District Court's Award With Respect to Loss in Rental Value Was Correct.

Defendant has conceded liability for loss in rental value in the amount awarded by the District Court, \$18,918.36. That amount is correct. It is based upon and is well within the range of the well qualified expert who testified at the trial of the action [R. 541-552 (qualifications of Stanley E. Goode, Jr., defendant's farm valuation expert)].

1. The Acreage Figures Used by the District Court Were Correct.

Plaintiff's total land area was approximately 273 acres. Some of this was not capable of being irrigated with stream water but would best be devoted to "dry farming," *i. e.*, land dependent solely upon rain water for fertility, and much was not capable of growing crops at all [R.

567]. Of course plaintiff's claim properly relates only to that land which could be irrigated with stream water. Plaintiff claims that the District Court should have included 100 acres in this category instead of 82 (Pltf. Op. Br. p. 38). The award of the District Court, however, actually credits plaintiff for loss of rental of approximately 100 acres and not 82 [R. 45 reflects that the District Court awarded plaintiff for loss of rental as follows: 56.55 acres at \$60.00 per acre, 25.80 acres at \$40.00 per acre, and 18 acres at \$10.00 per acre for a total of 100.35 acres]. Moreover, the award of \$10.00 per acre for the 18 acres indicates that the alkali land was included by the District Court. In this connection it should be noted that there was testimony from which the District Court could have excluded this particular acreage from the award completely. This is so because defendant's expert testified that this 18 acres was really not affected by the pollution at all "since the land was best suited for wet pasture, and for that purpose would bring a rent of \$10.00 per year under either condition" [R. 579-580]. By this it is undoubtedly meant that this particular land could have used even polluted water for pasturage purposes. It should also be pointed out that even the polluted water was good for some purposes such as the growing of crops by pre-irrigation, *i.e.*, irrigation before planting and for the watering of pasture land.

Plaintiff takes the position that 50 acres of this land which admittedly had never been irrigated before should have been included by the District Court in the irrigable classification at least for the years 1951 and 1952 because this 50 acres could have been irrigated by water from a well dug in 1950. It is submitted that the District Court

correctly refused to include these 50 acres because they had no relation to the defendant's tort and whether they could have been irrigated or not is subject to mere speculation and conjecture.

2. The Rental Value Per Acre Allowed by the District Court Was Adequate.

(a) THE DISTRICT COURT SITTING AS THE TRIER OF FACTS WAS JUSTIFIED IN ACCEPTING THE VALUATION FIGURES TESTIFIED TO BY DEFENDANT'S EXPERT, STANLEY E. GOODE.

It is apparent from a comparison of the District Court's award with respect to loss of rental value and the testimony of Mr. Goode [R. 540-649] that the District Court relied upon the figures testified to by Mr. Goode in the making of its award [R. 579-580]. No question is raised by plaintiff as to Mr. Goode's qualifications to testify as an expert in this field, and indeed no such question exists. The record contains ample evidence of his qualifications to do so [R. 541-552], and those qualifications remain unshaken after plaintiff's cross-examination of this witness [R. 597-617].

Plaintiff in his opening brief contends that the investigation made by Mr. Goode was so cursory that his testimony should not be credited, and instead should give way to the testimony of plaintiff's expert, Mr. Thomas Anderson, and of the plaintiff himself, admittedly not an expert in the field of land valuations. This contention is without merit. The investigation made by Mr. Goode was ample to permit him to testify and to have his testimony be given maximum weight [R. 553-579].

- (b) THE DISTRICT COURT AS THE TRIER OF FACT WAS JUSTIFIED IN REJECTING THE VALUATION FIGURES TESTIFIED TO BY PLAINTIFF'S EXPERT, MR. ANDERSON, AND BY THE PLAINTIFF HIMSELF.

Defendant feels that this forum is not a proper one for the arguing of fact questions once decided by a trier of fact and supported by evidence brought about at the trial of the action. In this case the District Court has decided at what figure plaintiff's loss of rental value should be set. That figure was based upon the testimony of a competent expert, Mr. Goode. The District Court was at liberty to reject the testimony of plaintiff's expert, Mr. Anderson, and was entitled to reject the figures set by the plaintiff himself, who did not even qualify as an expert in a field where it seems that expert testimony should be required.

3. The District Court Correctly Deducted \$8,711.64 From Plaintiff's Total Loss of Rental as Estimated Dry Crop Receipts.

An explanation of the reason for any deduction from the loss of rental value computed by the District Court appears to be in order. The District Court deducted this sum from the total loss of rental because that sum was its estimate of what the land should have brought in the way of rentals notwithstanding the pollution. Plaintiff contends that the amount of the deduction, \$8,711.64 [R. 45], was too high because of what was apparently a mathematical error in the District Court's computation. Defendant submits, however, that there was evidence in the record permitting the Court below to deduct a much higher sum than that actually deducted, namely, the testimony of defendant's expert, Mr. Goode, as to other uses to which

the land could have been put, notwithstanding the pollution of the stream [R. 580]. Defendant thus submits that the sum deducted by the District Court represented a decision on a question of fact which should not now be disturbed.

III.

The District Court Properly Excluded Plaintiff's Offer of Evidence Regarding What Plaintiff Calls "An Effort to Mitigate Damages."

Defendant agrees with plaintiff that there exists a general principal in the law of damages under which legitimate expenses incurred in a reasonable effort to mitigate damages may be recovered against the wrongdoer. It should, however, be emphasized that these expenses must be legitimate and must be reasonable.

The District Court rejected an offer of evidence as to expenses allegedly incurred by plaintiff in what plaintiff chooses to call an "effort to mitigate damages" [R. 398-400]. Plaintiff submits that the offered evidence was properly rejected on the grounds of immateriality because the offered evidence if received would bear no relation to the defendant's tort in the causal sense, is highly speculative in other respects and may be properly described, as a matter of law, as not falling within the category of reasonable expenses incurred in a legitimate effort to mitigate damages.

In this connection plaintiff uses the phrase "no permanent benefit" apparently under the belief that whatever is spent resulting in no permanent benefit to the spender may be recovered. It is submitted that much more is needed beside "no permanent benefit" before one can recover under the theory of mitigation of damages.

Plaintiff, by attempting to introduce this evidence, sought to charge the defendant for such items as: depreciation of equipment, auto and truck maintenance, rental of equipment, fees for accountants and legal fees not connected with this litigation and insurance on the premises [R. 399]. It is submitted that the Court below properly rejected this evidence on the ground of immateriality.

Deserving of special mention is defendant's offer to prove that he expended \$15,977.66 as traveling expenses [R. 399] which he now contends ought to have been allowed because it was money spent in an effort to mitigate damages. Standing alone, defendant fails to see the materiality of this evidence. It is well nigh inconceivable that a recovery of this sum would be permitted in a tort case where the gravamen is pollution of a stream. Nor is this particular aided by argument in plaintiff's brief, for no particular reference is made therein.

Conclusion.

The defendant admits liability for its negligence. It should not, however, be held liable for more than that for which it was responsible. The plaintiff no doubt had great plans for this land, but generally speaking, these plans were still within his own mind at all times herein material. The fact that these plans could not bear fruit should not be laid to the feet of the defendant by requiring of it the payment of money damages. Defendant has conceded liability for loss of rental value recognizing that plaintiff has suffered a real loss in this respect. The award of the District Court for loss of rental is adequate and does compensate plaintiff for all of the loss for which the law allows a recovery. Plaintiff is indeed a remarkable man who is capable of intelligent thought. This is indeed ad-

mirable. But when all we have is thought and no more, recovery must be allowed only for that capable of some objective measurement.

It is respectfully requested that the action of the District Court in allowing any recovery for increased costs be reversed, and that the action of the District Court in all other respects be affirmed.

Respectfully submitted,

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No. 14588

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,
vs.

ADOLPH G. SUTRO,
Appellee,

ADOLPH G. SUTRO,
Cross-Appellant,
vs.

UNITED STATES OF AMERICA,
Cross-Appellee.

REPLY BRIEF OF
CROSS-
APPELLANT

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FILED

MAY 16 1955

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No. 14588

IN THE

United States Court of Appeals

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UNITED STATES OF AMERICA,
Appellant,
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ADOLPH G. SUTRO,
Appellee,

ADOLPH G. SUTRO,
Cross-Appellant,
vs.

UNITED STATES OF AMERICA,
Cross-Appellee.

REPLY BRIEF OF CROSS- APPELLANT

SUMMARY OF ARGUMENT

1. Plaintiff is entitled to recover damages for the increased cost of all buildings to be erected on his property, as well as the domestic water and sewerage systems, irrigation system, fencing, tools and machinery. Plaintiff's losses in that regard were proximately caused by defendant's admittedly wrongful acts; his intention to make the improvements is clearly established in the record; the amount of his loss as to some improvements is in the record, and the amount of his loss as to other improvements can be accurately shown if the case is remanded for that purpose.

2. Plaintiff is entitled to damages for loss of use of his land based on not less than 100 acres of irrigable crop land prior to 1950 and 150 acres of irrigable crop land after 1950. The testi-

mony of the defendant's expert witness must be completely rejected, and an award should be made in an amount between \$58,876.36 and \$55,376.36 for loss of use of the land, based upon the only acceptable evidence in the record.

3. Plaintiff should have been permitted to present evidence as to his expenditures, in order that the court could determine which expenditures were properly made in mitigation of damages, and so that plaintiff could be awarded damages for the amount of such expenditures.

I.

PLAINTIFF IS ENTITLED TO RECOVER DAMAGES EQUAL TO THE INCREASED COST OF ALL IMPROVEMENTS

A. PLAINTIFF WAS DAMAGED IN AN AMOUNT EQUAL TO THE INCREASED COST OF IMPROVEMENTS AS THE PROXIMATE RESULT OF DEFENDANT'S ADMITTED WRONGDOING.

In its answering brief as appellee, defendant argues that it should not be required to compensate Mr. Sutro for any of his loss arising out of the increase in building and other costs between 1946 and 1952 because, it says, its admittedly wrongful acts did not proximately cause that loss. Defendant bases a major portion of its argument on the proposition that it did not prevent Mr. Sutro from proceeding with construction in 1946.

True, the Government did not physically seize possession of the property and dispossess him. It did not post sentries around the property to keep Mr. Sutro from entering upon it. It was a physical possibility for Mr. Sutro to build in accordance

with his plans, but no more than a mere physical possibility.

Defendant's pollution of the stream and well made illegal the type of farming operation which would otherwise have been the highest and best use of the land. That illegality made not only useless but foolish any investment in the type of irrigation system and farm equipment which otherwise would have been necessary to obtain a reasonable return from a farming operation of the type upon which Mr. Sutro intended to embark. Without the ranch in operation, and without the buildings which would otherwise have been built, Mr. Sutro had little use and no space for machinery and tools which he otherwise would have bought and used.

Defendant's pollution of the stream and well deprived Mr. Sutro of any source of water for domestic purposes. Without water on the land for drinking, cooking, bathing and washing, life on the land, even if not physically impossible, would be difficult indeed. Defendant apparently believes Mr. Sutro should have built his home relying exclusively on bottled water for all those purposes. Even if the Health Department would have permitted such a course of action (which it certainly would not), the very thought of working or living on a sewer farm would have made it almost impossible to obtain qualified help, and precautions which would have been necessary to protect the health of workers on the ranch would have been so costly and burdensome as to make operation all but impossible.

In short, defendant's wrongful pollution of the stream and well directly and immediately interfered with and prevented plaintiff from constructing the planned buildings on his ranch, installing the water, irrigation and sewerage systems, and purchasing machinery and tools. The damages sustained by plaintiff flowed as directly from the defendant's tort as did the sewage from its plant.

B. THE EVIDENCE SHOWING THAT PLAINTIFF INTENDED IN 1946 TO MAKE ALL IMPROVEMENTS AS TO WHICH DAMAGES ARE CLAIMED IS CLEAR AND CONVINCING.

1. *No written memorandum is necessary for establishment of plaintiff's right to recovery.*

As to certain improvements, including the domestic water and sewerage systems, irrigation system, fencing, farm equipment and tools, defendant raises a second argument. Defendant says it is not responsible for Mr. Sutro's losses in connection with those items because he failed in 1946 to make a written memorandum of his intention to construct or purchase the items listed. Defendant seems to think the Statute of Frauds somehow applies to this case. Certainly there is no legal necessity for a writing in such a case as this, and in fact the existence of a written memorandum relative to some of the items would be most unusual and surprising. Who ever made a blueprint before constructing a simple farm fence?

The only requirement of evidence in this case should be that it establish Mr. Sutro's 1946 intention with a reasonable degree of certainty. That requirement, we submit, was met. An examination of the evidence regarding each item leaves little room for doubting that it would have been built or bought long ago but for the defendant's tortious conduct.

2. *Recovery should be allowed for increased cost of the domestic water system.*

The 1946 plans include a residence, a guest house, and a help house. The plans for each building indicate inside plumb-

ing, without which permits for construction could not be obtained, and without which the buildings would be practically unuseable. While no detailed plans were drawn in 1946, it is obvious that some sort of pressure tank, heater, piping and drain would be necessary. The plan submitted at the time of trial shows a system of modest size, which is exactly what would be expected in connection with such buildings. Supported by Mr. Sutro's testimony that it is substantially what he intended in 1946 when the buildings were designed, its rejection seems extremely arbitrary.

3. *Recovery should be allowed for increased cost of the sewerage system.*

The same applies to the sewerage system. While defendant for years apparently regarded adequate sewerage as unnecessary, and only since the judgment of the District Court was rendered herein has finally conceded that its conduct in this connection was wrongful, most people have at all times been more fastidious. Plans for the various ranch buildings show inside bathrooms. Soil pipes and septic tanks were therefore a necessity, and of course were intended in 1946. The cost estimate submitted by Mr. Burlake was based on the *minimum* requirements of the San Diego County Health Department (R. p. 504). It certainly cannot be contended that Mr. Sutro planned or should have planned a cheaper system than that.

4. *Recovery should be allowed for increased cost of fencing.*

No plan for the fencing was prepared in 1946, but who would make a careful advance plan of an ordinary farm fence? All ranches in the area are fenced, and inside fencing was nec-

essary because a portion of the land was to be used as pasture, while the balance was to be planted in crops. The cost estimate submitted is for a perfectly ordinary type of farm fence, of materials generally used in the region and no speculation is involved in computing the cost. To deny all recovery for increased cost of fencing merely because no *exact plan* was made in 1946 places form above substance.

5. Recovery should be allowed for increased cost of constructing the irrigation system in its entirety.

The irrigation system falls into the same category. The ranch could not be operated without an irrigation system. Mr. Tedford, of the Soil Conservation Service, testified that Mr. Sutro discussed his plan for the system with him in 1945 and 1946, and letters to pump manufacturers written during those years are in evidence. The system is now almost complete, and was built in accordance with the plans in evidence. It should be noted that the pumps to be used with the system are much smaller and less expensive than those ordinarily used to water such a large acreage, because Mr. Sutro's system calls for pumping water 24 hours a day into reservoirs, from which it is released in large quantities only during the day. There is no room for question. Mr. Sutro intended in 1946 to build the system substantially as shown in those plans. We repeat the suggestion made in the note at page 26 of our former brief that if the Court has any doubt upon this point, it may remand the case to the District Court to take evidence establishing that the system has now actually been installed in accordance with these plans.

6. *Recovery should be allowed for increased cost of tools and machinery.*

The plan for the shop building shows the location and approximate size of each tool. The only detail not shown is the brand. The brands used for estimating cost are medium grade, neither deluxe nor shoddy. They are what would be bought by a person thinking of both price and quality, and they are in general what Mr. Sutro intended to buy in 1946. Should he be made to bear the burden of defendant's wrong completely without compensation because he did not enter the one additional item of brand names on the shop drawing made in 1946?

Likewise, no list of farm machinery was prepared in 1946, but the list now submitted is for the minimum amount of machinery required for operation of a sizeable farming enterprise.

Regarding costs of all of these items, the first question should be (a) was it intended in 1946, and (b) if so, what was the increase in cost. There can be no doubt that all those items were intended in 1946. The increased cost of most items is in evidence, and the increased costs of the other items can be established easily if this case is remanded to the District Court for that purpose. All of those increased costs should be allowed to plaintiff as damages.

C. PLAINTIFF'S KNOWLEDGE IN 1946 OF DEFENDANT'S WRONGDOING AS TO THE STREAM DOES NOT DEFEAT PLAINTIFF'S RIGHT OF RECOVERY.

Defendant argues that Mr. Sutro may not be entitled to damages because at the time he bought the ranch he knew that the stream was polluted. The stream had in fact been polluted

for several weeks. This evidence is uncontradicted, and defendant does not deny that. Mr. Sutro did not know that the *well* was also polluted. Moreover, plaintiff had no reason to anticipate that the stream would remain polluted for a half dozen years. On the contrary, he was entitled to presume that the defendant would obey the law and cease and desist from polluting the stream. No physical impediment existed. Defendant could have stopped the pollution in 1946 as easily as it in fact stopped the pollution in 1952. It just did not choose to do so. Mr. Sutro was repeatedly assured by high-ranking Government officials that the pollution was a very temporary matter. It now ill becomes the United States Government to argue that because in 1946 it had erred for a brief time, a citizen was bound to anticipate that its wrongful conduct would continue unabated for years to come.

Defendant declares it cannot see the importance of pollution of the well. The importance is obvious. Believing that the water in the well was pure, Mr. Sutro actually commenced construction of the buildings, and if the well had not been polluted, he could have commenced irrigated farming in 1946. (See footnote, pp. 13 and 14, plaintiff's former brief.) The well is of large capacity, and is capable of supplying all domestic needs as well as irrigating a large crop acreage. Throughout this proceeding, from the time the original complaint was filed, plaintiff has based his case not only on the pollution of the stream but also on the pollution of the well, which, of course, resulted directly from the defendant's wrongful dumping of sewage into the watershed (See, for example, complaint, pars. IV and V, R. pp. 9-11). If either the well or the stream had been pure, Mr. Sutro's damage would have been limited to loss of use of only a portion of the farm land, and there would have been no loss at all as to buildings and improvements. Statements in defendant's answering

brief indicating that this action is based solely upon pollution of the stream are utterly without foundation in the record.

II.

THE DISTRICT COURT'S AWARD WITH RESPECT TO LOSS OF RENTAL VALUE WAS INADEQUATE

A. THE DISTRICT COURT ERRED IN ACCEPTING TESTIMONY ON LOSS OF RENTAL VALUE GIVEN BY DEFENDANT'S EXPERT.

It is true, as defendant says, that plaintiff does not question the basic qualifications of Mr. Goode, the appraiser defendant imported from Santa Ana. However, as is shown in plaintiff's opening brief, Mr. Goode's preparation for this particular appraisal was grossly inept. His ignorance of local conditions, his failure to consider crucial factors, and his almost total reliance on wholly irrelevant facts deprive his testimony of all value.

While Mr. Sutro testified under the well established rule that a landowner can express an opinion regarding his own property, rather than as an expert, his preparation for the appraisal was actually far superior to that of Mr. Goode, and his analysis would have done credit to a professional appraiser.

Mr. Anderson, plaintiff's appraiser, was eminently qualified and was familiar with local conditions. He had handled sales and leases of many pieces of property in the region. He, too, considered the factors which directly bear on rental value, and his opinion should not have been lightly dismissed.

B. THE DISTRICT COURT ERRED IN REFUSING TO ALLOW DAMAGES FOR LOSS OF RENTAL VALUE OF AN ADDITIONAL FIFTY ACRES AFTER 1950.

In its argument on rent, defendant repeats the inexplicable error mentioned above by declaring that plaintiff's recovery for loss of use must be limited to land which can be watered with stream water. Plaintiff never intended to irrigate solely with stream water. He intended to use both stream and well water, and the existing irrigation system is so designed. Throughout this case, plaintiff has claimed damages for the combined result of pollution of the stream and the well.

Defendant likewise errs when it summarily rejects plaintiff's claim for loss of use of fifty acres which could have been watered from the new well drilled by Mr. Sutro in 1950 in an attempt to find a pure water supply. That well exists. It has been thoroughly tested and its pumping capacity and cost are in the record. Those figures clearly establish that it will produce enough water to irrigate fifty acres, even when the other well is pumped to capacity. That evidence is undisputed. It is equally undisputed that the new well was polluted by defendant and so could not be used for domestic use or ordinary irrigation purposes. Mr. Sutro was therefore deprived of the value of the land which that well was capable of irrigating. He had both the land and the water. The only impediment was the pollution wrongfully and needlessly caused by defendant, and for that defendant should pay.

C. THE DISTRICT COURT ERRED IN BASING ITS AWARD FOR LOSS OF USE OF ALKALIZED LAND ON ITS VALUE AS PASTURE INSTEAD OF CROP LAND.

Defendant argues that the court gave adequate damages for

loss of use of eighteen acres of alkalized land because it allowed \$10 per acre, based on use of the alkalized land as pasture. Defendant misses the point that since the eighteen acres would not have been alkalized but for defendant's wrongful act of silting Pilgrim Creek, and since the land can be and now is being reclaimed, that land should have been treated in the award as irrigable crop land, not pasture. Defendant seeks to take advantage of its own wrong when it argues that damages should be allowed only on the basis of loss of use as pasture.

D. THE DISTRICT COURT'S MATHEMATICAL ERROR
IN CALCULATING DAMAGES SHOULD BE COR-
RECTED.

Defendant argues that the court's obvious mathematical error in computing the deduction from loss of rental value should go uncorrected because Mr. Goode imagined possible uses for that land with polluted water which would have permitted even larger deduction. Without going into the merit, or lack of merit, of Mr. Goode's suggestions, it seems clearly improper to convert a mathematical error into a finding of fact. Even if it were conceded that the court could have deducted a larger amount without any explanation, the fact remains that the court did explain to a degree the process by which it reached its result, and the exact dollars and cents figure arrived at by the court can be explained only as being the result of a mathematical error, as is demonstrated in plaintiff's opening brief, pages 49 and 50. It would be a serious injustice to permit that error to go uncorrected.

III.

PLAINTIFF SHOULD BE PERMITTED TO PRESENT EVIDENCE CONCERNING HIS EXPENDITURES TO MITIGATE DAMAGES

Defendant seeks to justify exclusion of all evidence concerning Mr. Sutro's efforts to mitigate damages on the grounds that the evidence would be immaterial and speculative. It is submitted that efforts to preserve the land from erosion, which would have been wholly unnecessary but for defendant's tort, expenses of storage of equipment which would have otherwise been kept in buildings constructed on the ranch and used in ranch operation, and expenses of travel to meetings called by Navy officials to discuss ways and means of correcting the situation all bear a very direct relationship to defendant's tort, and should have been considered.

Defendant does not deny that its agent, the Public Works Office of the Eleventh Naval District, advised Mr. Sutro that he was legally obligated to mitigate damages. Instead, defendant picks the phrase "no permanent benefit" out of plaintiff's "Specifications of Error" and seeks to create the impression that lack of permanent benefit is the sole reason given by plaintiff for recovery of his expenditures. That phrase does not even appear in plaintiff's argument. It is, of course, a condition of recovery, but not a reason for recovery.

As is shown in plaintiff's opening brief, many, if not all, of the expenditures were made reasonably and in good faith to prevent greater damage from occurring than did in fact occur. The expenditures would not have been necessary but for defendant's wrongdoing, they were far less in amount than the harm foreseeable if they were not made; and they were in fact suggested

by defendant's own agent. Incidentally, they resulted in no permanent benefit except to the degree they minimized the harm done by defendant's tortious conduct. The court should have permitted plaintiff to show how much was spent and for what it was spent in order that it could determine exactly which expenditures should be recovered in this action. Exclusion of evidence as to all expenditures merely because some might not be recoverable is indeed harsh and unjust.

IV.

ATTORNEYS' FEES

Section 2678 of Title 26 U. S. Code provides that "The court rendering a judgment for the plaintiff pursuant to Section 1346 (b) of this title . . . may, as a part of such judgment . . . determine and allow reasonable attorneys' fees which . . . shall not exceed . . . 20 per centum of the amount recovered under Section 1346 (b) of this title, to be paid out of but not in addition to the amount of judgment, award, or settlement recovered, to the attorneys representing the claimant."

Pursuant to the provision of this section the District Court ordered that plaintiff's attorneys be allowed 20% of the judgment awarded to the plaintiff, namely, the sum of \$6,384.27 to be paid to said attorneys out of the judgment for \$31,921.37. (Judgment, R. page 48.)

If this Court either increases or decreases the amount of the award to plaintiff, it is requested that in the light of the foregoing statute this Court should indicate the effect of any change made by it in the judgment to plaintiff upon the fees to be paid to plaintiff's attorneys, particularly in view of the concluding portion of said Section 2678 which prohibits an attorney from accepting any compensation in addition to that allowed by the court under said section.

CONCLUSION

Defendant's admitted wrongdoing over a period of many years was the proximate cause of injury to plaintiff for which under the laws of California he is entitled to compensation. No amount of money can make plaintiff completely whole, but the relief granted by the District Court is totally inadequate to compensate plaintiff for even that portion of his injury which can be repaired by an award of money. The judgment of that Court must be reversed and on the basis of evidence already in the record, plaintiff should be awarded damages of \$59,876.36 for loss of rental value of the property, instead of the \$18,918.36 allowed by the District Court; and damages of \$70,969.00 for increase cost of improvements as to which evidence was actually admitted, instead of \$13,003.03 as allowed by the District Court. The case should be remanded to the District Court with directions to receive evidence as to the increased cost of those improvements as to which the District Court has refused to receive evidence, and as to plaintiff's expenditures in an effort to mitigate damages, and to enter judgment for the plaintiff for the amount necessary to compensate plaintiff for the increased cost of such items and for the amounts necessarily and reasonably expended in the effort to mitigate damages.

Respectfully submitted,

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No. 14594

United States
Court of Appeals
for the Ninth Circuit

JACK SMITH and ROSE MAE SMITH,
Appellants,

vs.

HARRY C. WESTOVER, former Collector of Internal Revenue and ROBERT A. RIDDELL,
Director of Internal Revenue,
Appellees.

Transcript of Record

Appeal from the United States District Court for the Southern
District of California, Central Division

FILED

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PAUL P. O'BRIEN,
CLERK

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* Page numbers appearing at foot of page of original Transcript of Record.

In the District Court of the United States, Southern District of California, Central Division

No. 15161-Y.

JACK SMITH and ROSE MAE SMITH,
Plaintiffs,

vs.

HARRY C. WESTOVER, former Collector of Internal Revenue, and ROBERT A. RIDDELL,
Director of Internal Revenue,
Defendants.

COMPLAINT FOR REFUND OF FEDERAL INCOME TAXES AND INTEREST

Come Now the plaintiffs by their attorneys, Latham & Watkins, and for cause of action against the defendants allege as follows:

I.

Plaintiffs are, and at all times material to this action have been, husband and wife and residents of Los Angeles County, California.

II.

Defendant Harry C. Westover was, from on or about July 1, 1943 to on or about October 31, 1949, Collector of Internal Revenue for the Sixth District of California. Defendant Robert A. Riddell was Acting Collector from on or about October 1, 1949 to on or about April 30, 1950, Collector from on or about May 1, 1950 to on [2] or about Novem-

ber 26, 1952, and, since said last date, Director of Internal Revenue, all for said Sixth District of California.

III.

This action is filed pursuant to the provisions of Title 28, United States Code, Section 1340, for the recovery of income taxes and interest thereon erroneously and illegally collected from plaintiffs by defendants for the calendar years 1943 to 1948, inclusive, together with interest thereon from the dates of payment.

IV.

On or about October 1, 1943, plaintiffs became members of a partnership doing business under the name of Boston Shoe Company. The interest of plaintiff Jack Smith in the profits and losses of said partnership was 40%, and the interest of plaintiff Rose Mae Smith in the profits and losses of said partnership was 30%. The remaining partners were Jack Smith, as Trustee of the Barbara Ann Smith Trust, and Rose Mae Smith, as Trustee of the Howard Samuel Smith Trust, each having a 15% interest in the profits and losses of said partnership. Said partnership kept its books and computed its income on the calendar year basis.

V.

Said partnership was dissolved as of the close of business on December 31, 1944 and, as of January 1, 1945, a second partnership was formed by and between the plaintiffs, the Trusts as aforesaid, and one Herman Weishaupt. The interest of plain-

tiff Jack Smith in the profits and losses of said second partnership was 36%, and the interest of plaintiff Rose Mae Smith in the profits and losses of said second partnership was 27%. The interests of the remaining partners in said profits and losses were 13½% each for Jack Smith, as Trustee of the Barbara Ann Smith Trust, and Rose Mae Smith, as Trustee of the Howard Samuel Smith Trust, and 10% for Herman Weishaupt. Said second partnership kept its books and computed its income on the calendar year basis. [3]

VI.

Said second partnership was dissolved as of the close of business on June 30, 1948 by the withdrawal of said Herman Weishaupt, and, as of July 1, 1948, a third partnership was formed with partners and interests the same as set forth in Paragraph IV herein. Said third partnership continues in existence at the present time, and keeps its books and computes its income on the basis of the fiscal year ending January 31 of each year.

VII.

In each partnership, provision was and is made for salary allowances of \$25,000.00 per year to plaintiff Jack Smith and \$2,400.00 per year to plaintiff Rose Mae Smith. In the second partnership, provision was also made for a salary allowance of \$6,000.00 per year to Herman Weishaupt. Said salary allowances were and are deducted as expenses in arriving at distributable partnership income.

VIII.

In each of his separate Federal income tax returns for the calendar years 1943 to 1946, inclusive, plaintiff Jack Smith reported as income half of his said salary allowance, half of his wife's said salary allowance, and his distributable share of partnership net income computed as above set forth.

IX.

In each of her separate Federal income tax returns for the calendar years 1943 to 1946, inclusive, plaintiff Rose Mae Smith reported as income half of her said salary allowance, half of her husband's said salary allowance, and her distributable share of partnership net income computed as above set forth.

X.

In each of their respective Federal income tax returns for the calendar years 1943 to 1946, inclusive, the said Trusts reported their respective distributable shares of partnership net [4] income computed as above set forth.

XI.

Upon examination of said income tax returns at various times, the Commissioner of Internal Revenue refused to recognize the Trusts as partners and determined that the partnership income so reported by the two trusts should be taxed half to plaintiff Jack Smith and half to plaintiff Rose Mae Smith, and deficiencies in Federal income tax were

assessed against plaintiffs in accordance with such determination.

XII.

Deficiencies of tax and interest assessed were paid by plaintiffs to defendant Harry C. Westover for the calendar years and in the amounts as follows:

	By Plaintiff	By Plaintiff
Calendar Year	Jack Smith	Rose Mae Smith
1943	\$ 7,803.23	\$ 1,463.27
1944	13,664.16	11,961.54
1945	13,355.14	12,748.92
1946	23,907.98	22,565.80

XIII.

In his separate Federal income tax return for the calendar year 1947, plaintiff Jack Smith reported as income not only half of his said salary allowance, half of his wife's said salary allowance, and his distributable share of partnership net income computed as above set forth, but also half the distributable partnership income of the two trusts.

XIV.

In her separate Federal income tax return for the calendar year 1947, plaintiff Rose Mae Smith reported as income not only half of her said salary allowance, half of her husband's said salary allowance, and her distributable share of partnership income computed as above set forth, but also half the distributable partnership [5] income of the two trusts.

XV.

In their joint Federal income tax return for the calendar year 1948, plaintiffs reported as income not only their said salary allowances and their distributable shares of partnership net income computed as above set forth, but also the distributable partnership income of the two trusts.

XVI.

Plaintiffs' Federal income tax returns for the calendar years 1947 and 1948 were filed with, and the taxes shown thereon to be due were paid to, defendant Harry C. Westover. A deficiency of tax and interest in the amount of \$2,955.17, for the calendar year 1948, was paid by plaintiffs to defendant Robert A. Riddell.

XVII.

By reason of the foregoing, plaintiffs have overpaid their Federal income taxes and interest thereon for the calendar years 1943 to 1948, inclusive, in the following total amounts:

By plaintiff Jack Smith.....	\$ 56,965.08
By plaintiff Rose Mae Smith...	54,256.32
By plaintiffs jointly	8,557.73
	<hr/>
	\$119,779.13

All of said amounts were paid to defendant Harry C. Westover except the amount of \$2,955.17 for the calendar year 1948 which was paid to defendant Robert A. Riddell.

XVIII.

Plaintiffs duly filed their respective claims for refund on Treasury Department Forms 843 for the calendar years 1943 and 1944 on or about July 19, 1949; for the calendar years 1945 and 1946 on or about May 2, 1950; for the calendar year 1947 on or about March 15, 1951; and for the calendar year 1948 on or about March 15, 1952. In each claim, the reason given in support thereof was that the trusts should be recognized as partners and their [6] shares of the partnership income should be taxed to said trusts rather than to plaintiffs.

XIX.

The Commissioner of Internal Revenue, by registered mail, formally rejected said claims for the calendar years 1943, 1944 and 1945 on or about February 13, 1951 and formally rejected said claims for the calendar year 1946 on or about March 13, 1951. Said claims for the calendar years 1947 and 1948 have not yet been formally acted upon, but more than six months have elapsed since the filing thereof.

Wherefore, plaintiffs pray for judgment against the defendants as follows:

(1) In favor of plaintiff Jack Smith against defendant Harry C. Westover in the amount of \$56,-965.08, together with interest thereon as provided by law.

(2) In favor of plaintiff Rose Mae Smith against defendant Harry C. Westover in the amount of

\$54,256.32, together with interest as provided by law.

(3) In favor of plaintiffs jointly against defendant Harry C. Westover in the amount of \$5,602.56, together with interest as provided by law.

(4) In favor of plaintiffs jointly against defendant Robert A. Riddell in the amount of \$2,955.17, together with interest as provided by law.

(5) For costs of suit, and such other relief as the Court may deem proper.

LATHAM & WATKINS,
/s/ By HENRY C. DIEHL,
Attorneys for Plaintiffs [7]

Duly Verified. [8]

[Endorsed]: Filed February 11, 1953.

[Title of District Court and Cause.]

ANSWER

Come now the defendants, by their attorney, Walter S. Binns, United States Attorney for the Southern District of California, and by way of answer to the complaint say:

I.

The allegations contained in paragraph I of the complaint are admitted.

II.

The allegations contained in paragraph II of the complaint are admitted.

III.

The allegations contained in paragraph III of the complaint are admitted, except that it is denied that the taxes and interest collected from the plaintiffs were erroneously or illegally collected. [9]

IV.

The defendants are without information or knowledge sufficient to affirm or deny the allegations contained in paragraph IV of the complaint and they are accordingly denied.

V.

The defendants are without information or knowledge sufficient to affirm or deny the allegations contained in paragraph V of the complaint and they are accordingly denied.

VI.

The defendants are without information or knowledge sufficient to affirm or deny the allegations contained in paragraph VI of the complaint and they are accordingly denied.

VII.

The defendants are without information or knowledge sufficient to affirm or deny the allegations contained in paragraph VII of the complaint and they are accordingly denied.

VIII.

The defendants are at this time without informa-

tion or knowledge sufficient to affirm or deny the allegations contained in paragraph VIII of the complaint and they are accordingly denied.

IX.

The defendants are at this time without information or knowledge sufficient to affirm or deny the allegations contained in paragraph IX of the complaint and they are accordingly denied.

X.

The allegations contained in paragraph X of the complaint are denied.

XI.

The allegations contained in paragraph XI of the complaint are admitted. [10]

XII.

The defendants are at this time without information or knowledge sufficient to affirm or deny the allegations contained in paragraph XII of the complaint and they are accordingly denied.

XIII.

The defendants are at this time without information or knowledge sufficient to affirm or deny the allegations contained in paragraph XIII of the complaint and they are accordingly denied.

XIV.

The defendants are at this time without information or knowledge sufficient to affirm or deny the

allegations contained in paragraph XIV of the complaint and they are accordingly denied.

XV.

The defendants are at this time without information or knowledge sufficient to affirm or deny the allegations contained in paragraph XV of the complaint and they are accordingly denied.

XVI.

The allegations contained in paragraph XVI of the complaint are denied, except that it is admitted that the federal income tax returns of the plaintiffs for the calendar year 1947 were filed with defendant Harry C. Westover.

XVII.

The allegations contained in paragraph XVII of the complaint are denied.

XVIII.

The allegations contained in paragraph XVIII of the complaint are denied, except that it is admitted that the plaintiffs filed claims for refund on Treasury Forms 843 for the calendar year 1943 on July 19, 1949, for the calendar year 1946 on May 2, 1950, and for the calendar year 1947 on March 15, 1951, but each and every allegation contained in said claims for refund filed by the plaintiffs on the above mentioned dates is respectively denied. [11]

XIX.

The allegations contained in paragraph XIX of the complaint are denied, except that it is admitted that on or about February 13, 1951, the Commissioner of Internal Revenue, by registered mail, formerly rejected the claims for refund filed by the plaintiffs for the calendar years 1943, 1944, 1945 and 1946.

Wherefore, the defendants demand judgment that the complaint of the plaintiffs be dismissed and that the defendants be entitled to their lawful costs and disbursements herein.

LAUGHLIN E. WATERS,
United States Attorney
E. H. MITCHELL and
EDWARD R. McHALE,
Assistant U. S. Attorneys,
EUGENE HARPOLE,
Special Attorney, Bureau of
Internal Revenue

/s/ E. H. MITCHELL,
Attorneys for the Defendants [12]

Affidavit of Service by Mail attached. [13]

[Endorsed]: Filed August 19, 1953.

[Title of District Court and Cause.]

MEMORANDUM DECISION

The above-entitled cause heretofore tried, argued and submitted, is now decided as follows:

Judgment will be for the defendants that the plaintiffs take nothing by the Complaint. Costs to the defendants. Findings of Fact and Judgment to be prepared by counsel for the defendants according to Local Rule 7.

Comment

The plaintiffs, Jack Smith and Rose Mae Smith, husband and wife, seek to recover income taxes paid for the years 1943 to 1946, and interest. The claim arises out of a family partnership in the wholesale shoe business known as The Boston Shoe Company, successfully established by the plaintiff Jack Smith before his marriage to the plaintiff Rose Mae Smith. After marriage the spouses considered that the business was community property to which the husband's [14] earning capacity had contributed. On December 31, 1942, the husband bought the wife's interest for the sum of \$102,933.89, the purchase price being represented by four promissory notes in different amounts, with different due dates, one year apart, given by him to his wife on the same date.

On September 29, 1943, two trusts were created for the benefit of the children of Jack and Rose Mae Smith, one designated as the "Howard Samuel Smith Trust", in favor of the son then aged eleven;

the other named the "Barbara Ann Smith Trust", in favor of the daughter then aged three. The daughter is still under age. The son is now twenty-two, and, after securing a degree in chemistry at Stanford University, entered Harvard University as a post-graduate student, and now has been accepted at the Harvard Law School. These seemingly minor facts are, in cases of this character, of great importance, because, despite the fact that the son may, during his vacations, have worked in the shoe business, he is not preparing for the business, and it is not likely that a man with such educational background would engage in such business with his father after completing his education.

But back to the Trusts. In creating them, there was assigned by the father to the "Howard Samuel Smith Trust" three United States certificates of indebtedness totaling the principal sum of \$30,000.00. To the "Barbara Ann Smith Trust" there was assigned one of the \$30,000.00 notes executed by Smith to his wife.

The Trusts are irrevocable. They are subject to the absolute power of the parents as trustees, the beneficiaries having only "the right to enforce" performance. The distribution of the income is controlled by the trustees. [15] So is the investment of the principal. The children have a graduated right to the distribution of the corpus of the trust, one-fourth upon reaching the age of 25, one-fourth at 30, and the balance at 35. Almost simultaneously with the creation of the two trusts a partnership in

the shoe business was entered into effective September 20, 1943, consisting of the members of the family. Jack Smith was assigned 40 per cent, Rose Mae Smith 30 per cent and the Trusts 15 per cent each in the Boston Shoe Company. The wife acquired her interest by surrendering a \$60,000.00 note executed to her by Jack Smith. Both trusts exchanged their assets for the respective interests in the new partnership. Under the terms of the partnership, which was modified at one time by including an employee, then returned to the original state, control continued to be exercised by Jack Smith. Salaries of \$25,000.00 per year for the husband and \$2400.00 for the wife were provided for (Art. V). The net proceeds of the business were to be distributed in accordance with the percentages established by the Trusts. The main partners retained the power to determine the amount of the salaries to be paid to themselves. The salaries were to be paid before any "distributive net profits" and were to be considered a part of the costs of "doing business". No business transaction could be conducted by the partnership without the approval of the husband (Art. VII). Nor could it enter into any contracts or incur any liabilities during the life of the husband, while he was a partner, without his consent. The life of the partnership was set at three years, and thereafter for successive minimum terms of two years. And the husband was given the right to purchase the partnership at book [16] value, in which event no good will could be considered as a part of the same (Art. X, especially

subdivision e). No amendment of the partnership could be made without the consent of the husband. The parents, as the trustees for the children, represented them in the partnership, so that the children had no direct or independent voice in the partnership.

The criteria by which the validity or invalidity of partnerships of this character are determined have been set forth by the Supreme Court in *Commissioner vs. Culbertson*, 1949, 337 U.S. 733, 742. They have been applied by me on repeated occasions. See, *Toor vs. Westover*, 1950 D.C. Cal., 94 F. Supp. 860; *Schlobohm vs. United States*, 1952, D.C. Cal., 105 F. Supp. 593. Among late cases from our Court of Appeals are *Parker vs. Westover*, 1950, 9 Cir., 186 F(2) 49; *Harkness vs. Commissioner*, 1952, 9 Cir., 193 F(2) 655. And see, *Schallerer vs. Commissioner*, 1953, 7 Cir., 203 F(2) 100.

Since the *Culbertson* case, the fact that the capital which created the trust came from the parents is not determinative of the matter. Courts take the view that the creation of trusts by parents out of concern for the future welfare of the children is a natural and laudable impulse. As said in *Miller vs. Commissioner*, 1953, 6 Cir., 203 F(2) 350, 354:

“Human experience teaches that the concern of parents over the financial security of their children is often greater than concern for their own security and enjoyment of the fruits of their labors.”

However, the other elements which are spelled out in the [17] Culbertson and subsequent cases, such as (1) absence of change of control in the business, (2) the power to terminate the partnership interest upon the terms of the managing partner, (3) the absence of judicial control through a court-controlled trustee or through a guardianship of the estate of the minors, (4) the lack of any expectation that the children would ever go into the business (a contrary expectation was the primary consideration in the determination of the case of *Miller vs. Commissioner*, *supra*, upon which so much reliance is placed by plaintiffs), (5) the large salary voted himself by the father,—\$25,000.00, and (6) the unlimited control of both the trusts and partnership,—all these clearly indicate that the partnership had no existence as a taxable entity. In reality, the husband continued to dominate and manage the business as he had before, subject only to the rights of the wife under the community property laws of California (Cal. Civil Code, Secs. 172-172a). That the parents generously deposited the profits of the partnership to the trusts and did not draw from them even legitimate moneys for the education of the children so that, in 1948, the value of each trust was around \$115,000.00, is praiseworthy. But the fact remains that the earnings for the years in question were the earnings of "the husband and wife" partnership to which neither the capital, skill or even the future expectations of the children added aught. The Commissioner was, therefore, right in disregarding the partnership of

the children for tax purposes during the years 1943 to 1946.

Hence the ruling above made.

Dated this 24th day of June, 1954.

/s/ LEON R. YANKWICH,

Judge

[18]

[Endorsed]: Filed June 24, 1954.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above case came on regularly for trial on June 18, 1954, before the Honorable Leon R. Yankwich, United States District Judge, sitting without a jury, the plaintiffs, appearing through their counsel, Latham & Watkins, by Henry C. Diehl and Richard W. Lund, Esqs., and the defendants appearing through their counsel, Laughlin E. Waters, United States Attorney for the Southern District of California, Edward R. McHale, Assistant United States Attorney for said District, Chief, Tax Division, and Bruce I. Hochman, Assistant United States Attorney for said District, and evidence both oral and documentary having been received, the Court having duly considered the same and on June 24, 1954, having filed its order of Findings of Fact and Judgment, the Court now finds as follows:

Findings of Fact

I.

Plaintiffs, husband and wife, are both adult citizens of the United States residents of the State of California suing in his or her own right. [19]

II.

Defendant Harry C. Westover was, from July 1, 1943 to October 31, 1949, Collector of Internal Revenue for the Sixth District of California. Defendant Robert A. Riddell was Acting Collector from October 1, 1949 to April 30, 1950, Collector from May 1, 1950 to November 26, 1952, and since said last date, Director of Internal Revenue, all for said Sixth District of California.

III.

In each of his separate Federal income tax returns for the calendar years 1943 to 1946, inclusive, plaintiff Jack Smith reported as income half of his said salary drawings, half of his wife's said salary drawings, and the balance of his distributable share of partnership net income as computed.

IV.

In each of her separate Federal income tax returns for the calendar years 1943 to 1946, inclusive, plaintiff Rose Mae Smith reported as income half of her said salary drawings, half of her husband's said salary drawings, and the balance of her distributable share of partnership net income as computed.

V.

Trusts were formed for the benefit of two minor children, which the Commissioner of Internal Revenue refused to recognize as partners and determined that the partnership income so reported by the two trusts should be taxed half to plaintiff Jack Smith and half to plaintiff Rose Mae Smith. Deficiencies in Federal income tax were assessed against them in accordance with such determination.

VI.

Deficiencies of tax and interest assessed were paid by plaintiffs to defendant Harry C. Westover for the calendar years and in the amounts as follows:

Calendar Year	Plaintiff	Plaintiff
	Jack Smith	Rose Mae Smith
1943	\$ 7,803.23	\$ 1,463.27
1944	13,664.16	11,961.54
1945	13,355.14	12,748.92
1946	23,907.98	22,565.80

VII.

Plaintiff Jack Smith and plaintiff Rose Smith in their separate Federal income tax returns for the calendar year 1947 reported as income half of their salary allowances, half of each other's salary allowance, their distributable share of partnership net income as computed, and also half for each of the distributable partnership income of the two trusts.

VIII.

In their joint Federal income tax return for the calendar year 1948, plaintiffs reported as income their said salary allowances and their distributable shares of partnership net income as computed and also the distributable partnership income of the two trusts.

IX.

Plaintiffs' Federal income tax returns for the calendar years 1947 and 1948 were filed with, and the taxes shown thereon to be due were paid to, defendant Harry C. Westover. A deficiency of tax and interest in the amount of \$2,955.17 for the calendar year 1948 was paid by plaintiffs to defendant Robert A. Riddell. All of the amounts were paid to defendant Harry C. Westover except the amount of \$2,955.17 for the calendar year 1948 which was paid to defendant Robert A. Riddell.

X.

Plaintiffs duly filed their respective claims for refund on Treasury Department Form 843 for the calendar years 1943 and 1944 on or about July 19, 1949; for the calendar years 1945 and 1946, on or about May 2, 1950; for the calendar year 1947, on or about March 15, 1951; and for the calendar year 1948 on or about March 15, 1952. In each claim, the reason given in support thereof was that the trusts should be recognized as partners and their shares of the partnership income should be taxed as said trusts rather than to the plaintiffs.

XI.

The Commissioner of Internal Revenue, by registered mail, on or about February 13, 1951, formally rejected said claims for the calendar year 1943, 1944 and 1945, and on or about March 15, 1951, formally rejected said claims for the calendar year 1946. Said claims for calendar years 1947 and 1948 have not yet [21] been formally acted upon, but more than six months elapsed between the filing thereof and the filing of this action.

XII.

The claim arises out of a family partnership in the wholesale shoe business known as the Boston Shoe Company, successfully established by the plaintiff Jack Smith before his marriage to the plaintiff Rose Mae Smith.

XIII.

After marriage the spouses considered that the business was community property to which the husband's earning capacity contributed. On December 31, 1942, the husband bought out the wife's interest for the sum of \$102,933.89, the purchase price being represented by four promissory notes in different amounts with different due dates, one year apart, given by him to his wife on the same date.

XIV.

On September 29, 1943, two trusts were created by written instruments for the benefit of the children of Jack and Rose Mae Smith, one designated

as the "Howard Samuel Smith trust", in favor of the son then aged 11; the other named the "Barbara Ann Smith trust", in favor of the daughter then aged 3. The daughter is still underage. The son is now 22, and, after securing a degree in chemistry at Stanford University, entered Harvard University as a post-graduate student, and now has been accepted at the Harvard Law School. Although the son may, during his vacations, have worked in the shoe business, he is not preparing for the business and it is not likely that a man with such educational background would engage in such business with his father after completing his education.

XV.

The corpus of the "Howard Samuel Smith trust" was three United States certificate of indebtedness totaling the principal sum of \$30,000.00, given by the father, Jack Smith. The corpus of the "Barbara Ann Smith trust" was a \$30,000.00 note executed by plaintiff Jack Smith to his wife Rose Mae Smith on December 31, 1942, and thereafter assigned to the trust by her. [22]

XVI.

The trusts are irrevocable. They are subject to the absolute power of the parents as trustees, the beneficiary having only "the right to enforce" performance. The distribution of the income is controlled by the trustee. So is the investment of the principal. The children have a graduated right to the distribution of the corpus of the trust, one-

fourth upon reaching the age of 25, one-fourth at 30, and the balance at 35.

XVII.

Almost simultaneously with the creation of the two trusts the partnership in the shoe business was entered into effective September 30, 1943, consisting of the members of the family. Jack Smith was assigned 40%; Rose Mae Smith, 30%; and the trust, 15% each in the Boston Shoe Company. The wife acquired her interest by surrendering a \$60,000 note executed to her by Jack Smith. Both trusts exchanged their assets for their respective interests in the new partnership.

XVIII.

Under the terms of the partnership, which was modified at one time by including an employee, then returned to the original state, control continued to be exercised by Jack Smith.

XIX.

Salaries of \$25,000.00 per year for the husband and \$2,400.00 for the wife were provided for under Article 5 of the first partnership agreement and thereafter continued under the other arrangements. The net proceeds of the business were to be distributed in accordance with the percentages established by the trusts.

XX.

The main partners, the two plaintiffs here, retained the power to determine the amount of the

salary to be paid to themselves. The salaries were to be paid before any "distributive net profits" and were to be considered part of the cost of "doing business". [23]

XXI.

No business transaction could be conducted by the partnership without the approval of the husband. Nor could it enter into any contract or incur any liability during the life of the husband, while he was a partner, without his consent.

XXII.

The life of the partnership was set at three years, and thereafter for successive minimum terms of two years.

XXIII.

The husband, plaintiff Jack Smith, was given the right to purchase the partnership at book value, in which event no good will could be considered as part of the same.

XXIV.

No amendment of the partnership could be made without the consent of the husband Jack Smith.

XXV.

The parents, Jack and Rose Mae Smith, as the trustees for the children, represented them in the partnership, so that the children had no direct or independent voice in the partnership.

XXVI.

At all times throughout the years involved con-

trol was exercised and maintained by the plaintiffs in this action. The creation of the partnership and trusts effected no change in the control of the business. The children had no independent voice in the management of the business either personally or through the trusts.

XXVII.

The power to terminate the partnership interest remained upon the terms of the managing partner, namely, Jack Smith.

XXVIII.

There was no judicial control of the children's interests through a court controlled trustee or through a guardianship of the estate of the minors.

XXIX.

There was a lack of any expectation that the children would ever go into the business.

XXX.

The father, plaintiff Jack Smith, voted a very large salary to himself, namely, \$25,000.00.

XXXI.

The plaintiffs retained unlimited control of both the trust and the partnership, indicating clearly that the partnership had no existence as a taxable entity.

XXXII.

The children through the trust or otherwise added neither fresh capital nor skill nor even the future expectation of services.

Conclusions of Law

I.

This Court has jurisdiction of this controversy and of the parties hereto.

II.

The partnerships, entered into between the trusts and the plaintiffs Jack Smith and Rose Mae Smith and later Herman Weishaupt, have no validity for income tax purposes for the years 1943 to 1948, inclusive.

III.

Neither children nor trusts for children either intended to or did enter into a bona fide partnership with their parents for a business purpose.

IV.

The Commissioner was, therefore, right in disregarding the partnership of the children for tax purposes during the years 1943 to 1946 to 1948.

V.

Plaintiffs have failed to sustain their burden of proof of showing defendants erroneously assessed and collected taxes from the plaintiffs. [25]

VI.

Defendants are entitled to judgment. Plaintiffs take nothing by this action and the complaint is

dismissed with prejudice and with costs to the defendants.

Dated: This 23rd day of August, 1954.

/s/ LEON R. YANKWICH,
United States District Judge [26]

[Endorsed]: Lodged Aug. 6, 1954. Filed Aug. 23, 1954.

In the United States District Court of the Southern
District of California, Central Division

No. 15161-Y Civil

JACK SMITH and ROSE MAE SMITH,
Plaintiffs,

vs.

HARRY C. WESTOVER, former Collector of Internal Revenue, and ROBERT A. RIDDELL,
Director of Internal Revenue,
Defendants.

JUDGMENT

The above cause came on regularly for trial on June 18, 1954, before the Honorable Leon R. Yankwich, United States District Judge, sitting without a jury, the plaintiffs appearing through their counsel, Latham & Watkins by Henry C. Diehl and Richard W. Lund, Esqs., and the defendants appearing through their counsel Laughlin E. Waters, United States Attorney for the Southern District

of California, Edward R. McHale, Assistant United States Attorney for said District, Chief, Tax Division, by Bruce I. Hochman, Assistant United States Attorney for said District, and evidence both oral and documentary having been received, the Court having after due deliberation on June 24, 1954, rendered its order for findings of fact and judgment and having filed its [27] Findings of Fact and Conclusions of Law and ordered that judgment be entered in favor of the defendants in accordance with said findings and conclusions;

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that the plaintiffs' complaint and prayer for judgment be denied and that the plaintiffs take nothing by reason of this action and that defendants have judgment for and shall recover from plaintiffs the amount of defendants' costs to be taxed by the Clerk of this Court in the sum of \$20.00.

Judgment rendered this 23rd day of August, 1954.

/s/ LEON R. YANKWICH,
United States District Judge [28]

Affidavit of Service by Mail attached. [29]

[Endorsed]: Lodged Aug. 6, 1954. Judgment Docketed and Entered Aug. 23, 1954. Filed Aug. 23, 1954.

[Title of District Court and Cause.]

PLAINTIFFS' MOTIONS TO AMEND FINDINGS AND JUDGMENT AND FOR A NEW TRIAL

Plaintiffs, by Latham & Watkins, their attorneys herein, respectfully move that the Court:

(1) Amend its findings, make additional findings, and amend the judgment accordingly, as hereinafter set forth, pursuant to rule 52 of the FRCP.

(2) Grant a new trial, open the judgment, amend and make new findings of fact, make new conclusions, and direct entry of a new judgment, as hereinafter set forth, pursuant to rule 59 of the FRCP.

The grounds upon which plaintiffs rely are that the Court erred in both fact and law. The motions are based upon the entire record, to which appropriate references will be made in the detailed specifications of error which follow. [30]

Errors

I.

The Court erred in finding (Para. XIII of Findings of Fact) that the spouses considered that the business was community property. Only part, in the total amount of \$205,867.79, was so considered. (Exh. 2; Tr. 49.)

II.

The Court erred in finding (Para. XIV) that plaintiffs' son is not preparing for the business and that it is not likely that a man with such educa-

tional background would engage in such business with his father after completing his education. There is no evidence in the record from which such a finding can be made by inference or otherwise.

III.

The Court erred in finding (Para. XVI) that the trusts are subject to the absolute power of the parents as trustees and that the distribution of the income and the investment of principal is controlled by the trustees. The parents are subject to the usual obligations of fiduciaries and the children as beneficiaries are entitled to faithful performance of the trusts. The trustees are required to accumulate trust income, except for payment of trust administration expenses. The trustees have no discretion respecting distributions to beneficiaries until after the beneficiaries reach the age of 21 years, at and after which time limited amounts may be distributed. Final distributions of corpus and accumulated income are specified by the trust instruments. (Exhs. 7 and 8, Article III (c) and (d) of each.) As a matter of fact, all living expenses of the children have been paid by the parents.

IV.

The Court erred in finding (Para. XVIII) that control of the partnership continued to be exercised by Jack Smith. In all events, any control was subject to the limitations of the partnership [31] agreements. (Exhs. 13 and 15.) Particularly in the partnership effective from January 1, 1945 to June 30,

1948, Jack Smith had no powers not also resting in other partners and he did not own a controlling interest. Individually he owned a 36% interest and as trustee he held a $13\frac{1}{2}\%$ interest, totalling only $49\frac{1}{2}\%$. (Exh. 15.)

V.

The Court erred in finding (Para. XX) that the plaintiffs retained the power to determine the amount of salary to be paid themselves. Under both partnership agreements, salaries were to be determined by the partners and under the second agreement, neither plaintiff owned a controlling interest.

VI.

The Court erred in finding (Para. XXI) that the partnership could not conduct any business transaction, enter into any contract, or incur any liability without the husband's consent. There was no such provision in the agreement effective from January 1, 1945 to June 30, 1948 (Exh. 15) and he in fact did not have control of that partnership.

VII.

The Court erred in finding (Para. XXII) that the life of the partnership was set at three years and thereafter for successive minimum terms of two years. The first partnership (Exh. 13) was to run for twenty years (Article IX).

VIII.

The Court erred in finding (Para. XXIII) that the plaintiff Jack Smith was given the right to pur-

chase the partnership at book value without also finding that all partners had the same right and that such right arose only as to the interest of a withdrawing or deceased partner. (Exhs. 13 and 15.)

IX.

The Court erred in finding (Para. XXIV) that no amendment of the partnership could be made without the consent of Jack Smith. [32] The second partnership (Exh. 15) specifically lodged said right in the partners entitled to receive a majority of the profits (Article XIII) and Jack Smith was not so entitled.

X.

The Court erred in finding (Para. XXVI) that creation of the partnership and trusts effected no change in the control of the business. Prior to the formation of the first partnership, Jack Smith owned and controlled 100% of the business. (Exh. 2.) During the first partnership, from October 1, 1943 to December 31, 1944, he owned but 40% individually and 15% as trustee, while Rose Mae Smith owned 30% individually and 15% as trustee. (Exh. 13.) During the second partnership, from January 1, 1945 to June 30, 1948, the interests were further changed to 36% for Jack Smith individually and 13½% as trustee, 27% for Rose Mae Smith individually and 13½% as trustee, and 10% for Herman Weishaupt, in no way related to any of the Smiths. (Exh. 15.) Furthermore, there is a basic difference between control exercised with unlimited discretion solely for one's personal benefit

and control exercised in a fiduciary capacity as a partner.

XI.

The Court erred in finding (Para. XXVII) that the power to terminate the partnership interest remained upon the terms of Jack Smith. There is nowhere in the record any evidence to support such a finding or from which such a finding might be inferred. A termination by him would constitute him a withdrawing partner and give the other partners the right to purchase his interest at book value. (Exhs. 13 and 15.)

XII.

The Court erred in finding (Para. XXVIII) that there was no judicial control of the children's interests through a court controlled trustee. While no intervivos trust is under court supervision in the sense that periodic reports are required, all [33] trustees are subject to court control.

XIII.

The Court erred in finding (Para. XXIX) that there was a lack of any expectation that the children would ever go into the business. Not only is there nothing in the record to support such a finding, but plaintiff Jack Smith testified that he hoped and expected that his son would go into the business. (Tr. 52-53.)

XIV.

The Court erred in finding (Para. XXX) that plaintiff Jack Smith voted a very large salary to

himself. The salary was determined by the partners in accordance with the partnership agreements and not by the "vote" of Jack Smith. The record shows that the amount was reasonable for the services rendered and the Court further erred in not so finding.

XV.

The Court erred in finding (Para. XXXI) that the plaintiffs retained unlimited control of both the trust and the partnership, indicating clearly that the partnership had no existence as a taxable entity. As already set forth, neither in fact nor law did the plaintiffs have unlimited control.

XVI.

The Court erred in finding (Para. XXXII) that the children through the trusts or otherwise added neither fresh capital nor skill nor even the future expectation of services. The trusts each contributed \$30,000.00 of capital of which they were the owners. The trustees participated in the operation of the business. As already shown, there was an expectation of services by the son.

XVII.

The Court erred in failing to make the following findings of fact:

(1) That capital was an important income producing element in the business of the Boston Shoe Co. [34]

(2) That the purpose of the trusts was to create an estate for said children upon their maturity.

(3) That the parents had planned first to invest the initial trust corpus in real estate and had abandoned this plan because of the inflated condition of real estate, and had invested said moneys in the shoe business in the belief that said business afforded the best opportunity to create a sizeable estate for the children.

(4) That the parents explained to their children the extent of the interest of each in the partnership.

(5) That fictitious name certificates were filed.

(6) That copies of the trust agreements and the partnership agreements were filed with the Union Bank as successor trustee.

(7) That under the trust agreements the trustees did not and could not use any part of income or principal to satisfy the trustees' legal obligations to support their children or for any other purpose benefiting the plaintiffs.

(8) That the parents deposited the trusts' shares of partnership income in trust bank accounts and did not draw from them even legitimate moneys for the education of the children so that, in 1948, the value of each trust was approximately \$115,000.00.

(9) That the trust funds were managed by plaintiffs as fiduciaries, and that they at all times fulfilled their obligations as such fiduciaries.

(10) That Jack Smith's salary allowance of \$25,000.00 per year was reasonable in amount for the services rendered.

(11) That Rose Mae Smith worked in the busi-

ness and that her salary allowance of \$2,400.00 per year was reasonable in amount for the services rendered.

(12) That the trusts were valid legal entities entitled [35] to full recognition.

(13) That the partnerships were valid partnerships entitled to recognition for tax purposes.

(14) That the trusts' shares of the partnership income were taxable to the trusts and not the plaintiffs.

Points and Authorities

There is a basic difference between control exercised with unlimited discretion solely for one's personal benefit and control exercised only in a fiduciary capacity as a partner.

Toor vs. Westover, 200 F.2d 713 at 715.

Although the Toor case, *supra*, involved a limited partnership and the fiduciary relationship of a general partner to the limited partners, the same relationship exists between partners in a general partnership.

Sec. 15021, Calif. Corp. Code.

McMillen vs. Olmstead, 85 Cal. App. 656.

Perelli-Minetti vs. Lawson, 205 Cal. 642.

Although Congress has specifically provided that determinations as to the validity of a family partnership for tax purposes for any taxable year beginning before January 1, 1951 as if section 340(b) of the Revenue Act of 1951 had not been enacted, it is proper to refer to the legislative history of that

new statute in seeking to arrive at the prior status of the law.

Toor vs. Westover, 200 F.2d 713 at 716.

Two principles governing attribution of income have long been accepted as basic: (1) income from property is attributable to the owner of the property; (2) income from personal services is attributable to the person rendering the services. There is no reason for applying different principles to partnership income. If an individual makes a bona fide gift of real estate, or of a share of corporate stock, the rent or dividend income is taxable to the donee. Your committee's amendment makes it clear that, however [36] the owner of a partnership interest may have acquired such interest, the income is taxable to the owner, if he is the real owner. If the ownership is real, it does not matter what motivated the transfer to him or whether the business benefited from the entrance of the new partner.

Substantial powers may be retained by the transferor as a managing partner or in any other fiduciary capacity which, when considered in the light of all the circumstances, will not indicate any lack of true ownership in the transferee. In weighing the effect of a retention of any power upon the bona fides of a purported gift or sale, a power exercisable for the benefit of others must be distinguished from a power vested in the transferor for his own benefit.

H. R. Rep. No. 586, 82nd Cong., 1st Sess., Sec. V. M.

Sen. Rep. No. 781, 82nd Cong., 1st Sess., Sec. VI A 7.

1951-2 Cumulative Bulletin 380 and 485.

The Court ignored the trusts and treated them as having no legal existence, apparently only because the parents, rather than some other persons, were trustees. No authority has been found for such a determination. The parents, as trustees, had no powers different from those which a so-called independent trustee would have had. In fact, provision was made for successor trustees with the same powers.

This Court (Judge Yankwich) has upheld a family partnership under circumstances similar to those in this case, except that the children's uncle was trustee. He was no more "independent" nor subject to court supervision than are the parents here.

Osbrink vs. U. S., . . Fed. Supp. . . (1952).

This Court (Judge Harrison) has also upheld a family partnership where one parent-partner held the minor's interest as guardian.

Flandrick vs. U. S., 99 F. Supp. 718. [37]

At least one case has upheld a family partnership where the parents were trustees for the children.

Miller vs. Commissioner, 203 F.2d 350.

Referring further to the Miller case, *supra*, we respectfully disagree with this Court that an expectation that the children would go into the business "was the primary consideration in the determination of the case." (Memorandum Decision, p. 5.) The Court stated that the fact that the children were attending a pharmacy college "may indicate

that the inducement of giving them an interest in the business has stimulated them to study and prepare themselves in this field of endeavor." (Under-scoring supplied.) In other words, the trusts and partnership were established to induce the children to go into the business. It was not the expectation that they would that induced the parents to establish the trusts and partnership.

The same inducement was present in the case at hand when the trusts and partnership were established in 1943. The fact that the children are not yet in the business does not detract from the original purpose.

The basis for the Miller decision was that the trusts were set up for the benefit of the children, for their financial security, to give them an interest in the business and an incentive to engage therein. Every one of those elements is present in the case at hand.

Plaintiffs did not have unlimited control over the trusts, because control is exercised by courts of equity to which the beneficiaries could resort. Furthermore, the record shows that the trustees were most conscientious in the performance of their fiduciary obligations.

Miller vs. Commissioner, 203 F.2d 350 at 352.

The Court has referred to "the large salary voted himself by the father,—\$25,000.00," as a point against the plaintiffs. [38] Adequate compensation for working partners has always been a requirement for the recognition of family partnerships. Not to provide a substantial salary for Jack Smith

would allocate to the trusts more than their proper share of partnership income and would indicate a lack of reality in the partnership. The salary allowance should be and is a point in plaintiffs' favor.

In the Revenue Act of 1951, referred to above, Congress made sure that such salaries would be provided by making it a specific requirement of the law.

Conclusion

For the reasons stated, it is respectfully submitted that the Court should open the judgment, amend its findings in conformity herewith, and direct entry of judgment in favor of the plaintiffs.

September 1, 1954.

LATHAM & WATKINS,

/s/ By HENRY C. DIEHL,

Attorneys for Plaintiffs [39]

Acknowledgment of Service attached. [40]

[Endorsed]: Filed September 2, 1954.

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: Sept. 13, 1954. At Los Angeles, Calif.

Present: Hon. Leon R. Yankwich, District Judge.

Deputy Clerk: John A. Childress, Reporter: Marie Zellner.

Counsel for Plaintiffs: Henry C. Diehl.

Counsel for Defendants: Bruce I. Hochman.

Proceedings: For hearing motions of plaintiffs, filed Sept. 2, 1954, (1) to amend findings and judgment; and (2) for new trial.

It is Ordered that said motions are denied.

EDMUND L. SMITH,
Clerk

/s/ By JOHN A. CHILDRESS,
Deputy Clerk

[41]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Jack Smith and Rose Mae Smith, plaintiffs above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on August 23, 1954.

Dated: November 2, 1954.

LATHAM & WATKINS,

/s/ By HENRY C. DIEHL,

Attorneys for Appellants Jack Smith
and Rose Mae Smith

[42]

Affidavit of Service by Mail attached.

[43]

[Endorsed]: Filed November 3, 1954.

[Title of District Court and Cause.]

DESIGNATION OF RECORD

To the Clerk of the United States District Court
for the Southern District of California, Central Division:

Pursuant to Rule 75(a) of the Federal Rules of Civil Procedure, appellants designate the following portions of the record to be contained in the record on appeal in the above-entitled action to the Circuit Court of Appeals for the Ninth Circuit:

1. Complaint.
2. Answer.
3. Stipulation (of facts).
4. Transcript of evidence and proceedings on the trial.
5. Plaintiffs' exhibits.
6. Memorandum decision.
7. Findings of Fact and Conclusions of Law.
8. Judgment. [44]
9. Plaintiffs' Motions to Amend Findings and Judgment and for a New Trial.
10. Order Denying Motions to Amend and for a New Trial.
11. Notice of Appeal, with date of filing.

12. This designation.

Dated: November 2, 1954.

LATHAM & WATKINS,
/s/ By HENRY C. DIEHL,
Attorneys for Appellants Jack Smith
and Rose Mae Smith [45]

Affidavit of Service by Mail attached. [46]

[Endorsed]: Filed November 3, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 46, inclusive, contain the original Complaint; Answer; Memorandum Decision; Findings of Fact and Conclusions of Law; Judgment; Motions to Amend Findings of Fact and Judgment and for New Trial; Notice of Appeal and Designation of Record on Appeal and a full, true and correct copy of the Minutes of the Court for September 13, 1954, which, together with original plaintiff's exhibits 1 to 22, inclusive, and reporter's transcript of proceedings on June 18, 1954, transmitted herewith, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 8th day of December, A. D. 1954.

[Seal] EDMUND L. SMITH,
Clerk
/s/ By THEODORE HOCKE,
Chief Deputy

In the United States District Court for the Southern District of California, Central Division

No. 15,161-Y Civil

JACK SMITH and ROSE MAE SMITH,
Plaintiffs,

vs.

HARRY C. WESTOVER, former Collector of Internal Revenue, and ROBERT A. RIDDELL, Director of Internal Revenue,
Defendants.

TRANSCRIPT OF PROCEEDINGS

Los Angeles, Calif., Friday, June 18, 1954

Honorable Leon R. Yankwich, Judge presiding.

Appearances: For the Plaintiffs: Latham & Watkins, by Richard W. Lund and Henry C. Diehl, 900 Wilshire Blvd., Suite 830, Los Angeles 17, Calif.

For the Defendants: Laughlin E. Waters, United States Attorney, by Bruce I. Hochman, Assistant United States Attorney. [1*]

The Clerk: No. 15,161, Jack Smith and Rose Mae Smith vs. Harry C. Westover, et al., for trial. Mr. Diehl and Mr. Lund are present for the plaintiffs, and Mr. Bruce I. Hochman for the defendants.

The Court: Do you desire to make an opening statement? You filed a trial memorandum that seems to set forth the essentials of the controversy.

The Clerk: Mr. Diehl speaking.

Mr. Diehl: Your Honor, this, as you know, is a family partnership case.

The Court: That is right.

Mr. Diehl: The background is this, which the evidence will show: Mr. and Mrs. Smith, the plaintiffs, husband and wife, were married in 1931.

The Court: Just a moment.

Mr. Diehl: (Continuing) From that time until October 1, 1943, the business of the Boston Shoe Company was operated as an individual proprietorship of the plaintiff, Jack Smith.

At December 31, 1942, the plaintiffs, Jack and Rose Mae Smith, entered into an agreement by which the community interests of Rose Mae Smith in the business was purchased by her husband, Jack Smith.

Thereafter, in connection with their over-all planning, [2] and their desire to provide an estate for

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

their children, plans were made to set up trusts for the children, to which each of the parents would contribute the maximum allowed under the gift tax law tax-free, to wit, \$30,000.00.

At first it was thought that the trust funds might be invested in real estate. By the time the trusts were actually set up or in condition to be set up, it was their opinion that the real estate market had risen too much, and that that would not be a good investment.

They, therefore, decided to put the trusts into the partnership, which was the business best known by the husband, and which he considered he could use to the best advantage for the benefit of the children's trust.

Accordingly, the trusts were established on September 29, 1943.

The plaintiff, Jack Smith, contributed to his wife as trustee for his son three government bonds totaling \$30,000.00.

The plaintiff, Rose Mae Smith, contributed to her husband, as trustee for the daughter, one of the notes for \$30,000.00 which she had received from her husband in connection with the 1942 transaction, by which he had acquired her community interest.

At the same time the plaintiff, Rose Mae, repurchased an interest in the business to the extent of 30 per cent with two other of the \$30,000.00 notes which she had received from [3] her husband.

Then each trust purchased from the husband a 15 per cent interest in the business, the one trust using the government bonds in the purchase price,

and the other trust using the note. Thereupon——

The Court: Who were the trustees?

Mr. Diehl: Jack Smith, the plaintiff Jack Smith was trustee for the daughter's trust, and the plaintiff Rose Mae Smith was trustee for the son's trust.

The Court: Was there any action taken making them guardians of the estate, under the state law?

Mr. Diehl: No guardianship; just a trusteeship.

The Court: In other words, these were just one of these paper trusts that could be dissolved whenever they wanted to, and not bound by or controlled by any court.

Mr. Diehl: The trusts were irrevocable.

The Court: I know that, but they were not subject to any control by any court.

Mr. Diehl: Well, only insofar as any trust is subject to control by a court.

The Court: I mean, they were minors,——

Mr. Diehl: That is right.

The Court: ——and they made themselves guardians of the estate by virtue of parenthood without an order of the court?

Mr. Diehl: That is correct. [4]

The Court: I see. All right.

Mr. Diehl: Then on October 1, 1943, the Partnership No. 1 was established by a written agreement, which will be in evidence, by which the plaintiff Jack Smith had a 40 per cent interest, the plaintiff Rose Smith had a 30 per cent interest, and each of the trusts a 15 per cent interest.

The Court: And who represented the children in the partnership,—the parents?

Mr. Diehl: The parents as trustees. The partnership was between the two parents as individuals, and the two parents as trustees.

The Court: All right.

Mr. Diehl: That partnership continued until December 31, 1944, at which time one Herman Weishaupt, who was a key employee of the business, was taken in effective January 1, 1945, and a new partnership agreement was entered into at that time.

Herman Weishaupt acquired a 10 per cent interest, which reduced Jack Smith's interest to 36 per cent, Rose Mae Smith's interest to 27 per cent, and the two trusts to 13½ per cent. That was done by the contribution of additional capital by Weishaupt.

That partnership continued until June 30, 1948, at which time Weishaupt withdrew. His interest was acquired by Jack Smith, and the new partnership of the original four resumed at July 1, 1948.

The third partnership is not involved directly in this action for the reason that it adopted the January 31st fiscal year, so that its first year ended in 1949.

This case involves only the years 1943 through 1948 of the individuals.

Now, the Government, of course, has not questioned the interest of Jack and Rose Mae Smith, as individuals, in the profits of the business.

The Government has denied recognition to the trusts as partners. Deficiencies were proposed and paid by the plaintiffs for the years 1943 to 1946.

Thereupon the plaintiffs adopted a different pro-

cedure than before, and while partnership returns were filed showing the interests of all the partners, the parents under protest reported on their individual returns the income which was allocable to the trusts, and then thereafter filed claims for refund.

Now, in our evidence we propose——

The Court: That is sufficient. We will hear the rest from the witnesses.

Any statement by the Government?

The Clerk: Mr. Bruce Hochman.

Mr. Hochman: May it please the court: The Government contends, your Honor, that it was not a bona fide business purpose that was involved in the partnership trust arrangements, [6] and that the Commissioner is correct in the disallowance for income tax purposes of the arrangements set up by the plaintiffs.

The Court: I have had this type of case before me before, and I have ruled both ways, as shown by the fact that when I ruled in favor of the taxpayer, the Government appealed, and when I ruled against the taxpayer, the taxpayer appealed.

The Schlobohn case was a case in which I did not recognize the partnership, and there was another case—I forget the title of it—where I held the partnership was a valid partnership. So far as I am concerned, no law goes prior to those three decisions of the Supreme Court.

Mr. Hochman: The Tower case, the Culbertson case,——

The Court: ——the Tower case, the Culbertson case, and the third one.

Mr. Hochman: The Lusthaus case.

The Court: No law before that interests me, because no law before that is of any validity, because in those cases the court has laid down the criteria which we have to follow, and the question always is: Are these criteria which make a partnership valid or invalid in the present and particular case?

So let's go ahead and hear the evidence.

Mr. Diehl: If the court please, we have a brief written stipulation of facts, we have a brief oral stipulation to make, [7] and then we have numerous documents which counsel have agreed may go into evidence without further identification.

The Court: All right.

Mr. Diehl: I would offer, first, the written stipulation of facts, which in effect reduces the issues to the one question of whether the partnership was valid, and which also recites the fact that fictitious name certificates were filed by the two partnerships that were mentioned.

The Court: All right. It may be received.

The Clerk: Plaintiffs' Exhibit 1 in evidence.

(The document referred to was marked Plaintiffs' Exhibit 1 and was received in evidence.)

[See page 162.]

Mr. Diehl: Now, the oral stipulation I can take up next, before the documents.

The Court: All right.

Mr. Diehl: In the Complaint it is alleged, and denied on lack of information, that for the years 1943 to 1946, inclusive, the parents and the two

trusts filed returns reporting their shares of the partnership income, in accordance with their agreement, and paying their respective taxes.

The Court: All right.

Mr. Diehl: For the years 1947 and 1948 the partnership return reflects the income referred to in the agreement, but the parents reported all the partnership income under protest.

The trusts filed their own returns, which included only [8] other income, such as interest,—I guess interest was all in the bank account.

The Court: All right.

Mr. Diehl: Now, I believe it is agreeable to the defendant at this time to stipulate that that is the fact.

Mr. Hochman: So stipulated, your Honor.

The Court: All right.

Mr. Diehl: Now, we offer as Plaintiffs' Exhibit 2 the agreement of purchase by the husband of the community interest of the wife in the specific property, which is the agreement of December 31, 1942, by which the husband purchased the wife's community interest.

The Court: All right.

Mr. Diehl: We have executed copies of all of these documents, but counsel for the Government has agreed that we may introduce copies.

The Court: All right.

The Clerk: Is this admitted, your Honor?

The Court: It may be received.

The Clerk: Plaintiffs' 2 in evidence.

(The document referred to was marked Plaintiffs' Exhibit 2 and was received in evidence.)

[See page 164.]

Mr. Diehl: Plaintiffs' Exhibits 3, 4, 5 and 6 are promissory notes. I should take them up one at a time.

Plaintiffs' 3, note dated December 31, 1942, payable [9] to Rose Mae Smith by Jack Smith for \$30,000.00, due in one year. On the back it is endorsed, "Pay to the order of Jack Smith, Rose Mae Smith."

The Court: All right.

The Clerk: Plaintiffs' 3 in evidence.

(The document referred to was marked Plaintiffs' Exhibit 3 and was received in evidence.)

[See page 169.]

Mr. Diehl: Plaintiffs' 4 is also a \$30,000.00 note from the same payor to the same payee, of the same date, due in two years. It is endorsed on the back, "Payable to the order of Jack Smith. Rose Mae Smith."

The Clerk: Is this admitted, your Honor?

The Court: It may be received.

The Clerk: Plaintiffs' 4 in evidence.

(The document referred to was marked Plaintiffs' Exhibit 4 and was received in evidence.)

[See page 170.]

Mr. Diehl: As Plaintiffs' 5, a third \$30,000.00 note, the same parties, the same date, due in three

years, endorsed on the back, "Pay to the order of Jack Smith as Original Trustee of the Barbara Ann Smith Trust, a Voluntary Express Trust. Rose Mae Smith." Also a typewritten endorsement, "Pay to the order of Jack Smith, individually, in pursuance to agreement of sale and purchase of undivided interest in property."

The Clerk: Is this admitted, your Honor? [10]

The Court: It may be received.

The Clerk: Plaintiffs' 5 in evidence.

(The document referred to was marked Plaintiffs' Exhibit 5 and was received in evidence.)

[See page 170.]

Mr. Diehl: As Plaintiffs' 6, a note of the same date, between the same parties, but in the amount of \$12,933.89, due in four years.

The Clerk: Is this admitted, your Honor?

The Court: It may be received.

The Clerk: Plaintiffs' 6 in evidence.

(The document referred to was marked Plaintiffs' Exhibit 6 and was received in evidence.)

[See page 171.]

Mr. Diehl: Exhibit 7, declaration of trust by Jack Smith, original trustee, and Rose Mae Smith, trustor, for the benefit of the daughter Barbara Ann Smith.

The Court: What were the ages of the children at the time?

Mr. Diehl: Nine and two, I believe.

Mr. Jack Smith: Howard was born in '32, so in

1942 he was 11, and Barbara was born in 1940, so she was three.

Mr. Diehl: Eleven years old for the son, and three years old for the daughter.

The Clerk: Is this admitted, your Honor?

The Court: It may be received.

The Clerk: Plaintiffs' 7 in evidence. [11]

(The document referred to was marked Plaintiffs' Exhibit 7 and was received in evidence.)

[See page 171.]

Mr. Diehl: Plaintiffs' Exhibit 8 is a declaration of trust between Rose Mae Smith, original trustee, and Jack Smith, trustor, for the benefit of the son, Howard Samuel Smith.

Both trust declarations are dated September 29, 1943.

The Clerk: Is this admitted, your Honor?

The Court: It may be received.

The Clerk: Plaintiffs' 8 in evidence.

(The document referred to was marked Plaintiffs' Exhibit 8 and was received in evidence.)

[See page 193.]

Mr. Diehl: As Plaintiffs' 9, assignment and transfer by trustor Jack Smith to trustee Rose Mae Smith of three \$10,000.00 government bonds, dated September 29, 1943.

The Clerk: Is this admitted, your Honor?

The Court: It may be received.

The Clerk: Plaintiffs' 9 in evidence.

(The document referred to was marked Plaintiffs' Exhibit 9 and was received in evidence.)

[See page 194.]

Mr. Diehl: Plaintiffs' 10, assignment by trustor Rose Mae Smith to trustee Jack Smith of a note in the amount of \$30,000.00, dated September 29, 1943.

The Clerk: Is this admitted, your Honor?

The Court: It may be received. [12]

The Clerk: Plaintiffs' 10 in evidence.

(The document referred to was marked Plaintiffs' Exhibit 10 and was received in evidence.)

[See page 195.]

Mr. Diehl: Plaintiffs' 11, agreement of sale and purchase of the interest in specific property, between Jack Smith, seller, and Rose Mae Smith, purchaser, dated September 29, 1943, by which Rose Mae Smith purchased a 30 per cent interest in the Boston Shoe Company, a business.

The Clerk: Is this admitted, your Honor?

The Court: It may be received.

The Clerk: Plaintiffs' 11 in evidence.

(The document referred to was marked Plaintiffs' Exhibit 11 and was received in evidence.)

[See page 196.]

Mr. Diehl: Plaintiffs' 12, agreement of sale and purchase of undivided interest in property, dated September 30, 1943, by which Jack Smith sold to each of the trusts a 15 per cent interest in the

Boston Shoe Company, for a consideration of \$30,000.00 from each of them.

The Clerk: Is this admitted, your Honor?

The Court: It may be received.

The Clerk: Plaintiffs' 12 in evidence.

(The document referred to was marked Plaintiffs' Exhibit 12 and was received in evidence.)

[See page 202.]

Mr. Diehl: Plaintiffs' 13, articles of co-partnership, dated October 1, 1943, between Jack Smith and Rose Mae Smith, [13] as individuals, and Jack Smith, as trustee, and Rose Mae Smith, as trustee.

The Clerk: Is this admitted, your Honor?

The Court: It may be received.

The Clerk: Plaintiffs' 13 in evidence.

(The document referred to was marked Plaintiffs' Exhibit 13 and was received in evidence.)

[See page 208.]

Mr. Diehl: Exhibit 14 is a supplement to the articles of co-partnership, Exhibit 13, the supplement bearing the same date, and between the same parties, providing for a salary allowance of \$25,000.00 per year to Jack Smith and \$2,400.00 a year to Rose Mae Smith.

The Court: It may be received.

The Clerk: Plaintiffs' Exhibit 14 in evidence.

(The document referred to was marked Plaintiffs' Exhibit 14 and was received in evidence.)

[See page 234.]

Mr. Diehl: Plaintiffs' 15, articles of co-partnership, dated January 1, 1945, between Jack Smith and Rose Mae Smith, as individuals, and Jack Smith and Rose Mae Smith, as trustees, and Herman Weishaupt, being the second partnership which was referred to in my opening statement.

The Clerk: Is this admitted, your Honor?

The Court: It may be received.

The Clerk: Plaintiffs' 15 in evidence.

(The document referred to was marked Plaintiffs' Exhibit 15 and was received in evidence.)

[See page 237.]

Mr. Diehl: Plaintiffs' 16 is an agreement dated January 2, 1948, between Jack Smith and Rose Mae Smith, individually, and also as trustees, providing for payment by the trustees of income taxes on the trusts' share of the partnership income, even though charged by the Government to the parents.

The Clerk: Is this admitted, your Honor?

The Court: It may be received.

The Clerk: Plaintiffs' Exhibit 16 in evidence.

(The document referred to was marked Plaintiffs' Exhibit 16 and was received in evidence.)

[See page 268.]

Mr. Diehl: 17 is a schedule entitled, "Boston Shoe Company, Condensed Balance Sheet as of September 30, 1943," which is for the purpose of showing what the books showed on that date as the balance sheet of the individual proprietorship immediately prior to the formation of the partnership.

The Clerk: Is this admitted, your Honor?

The Court: It may be received.

The Clerk: Plaintiffs' 17 in evidence.

(The document referred to was marked Plaintiffs' Exhibit 17 and was received in evidence.)

[See page 272.]

Mr. Diehl: Plaintiffs' 18 is a schedule entitled, "Condensed Balance Sheets of Boston Shoe Company, October 1, 1943, to June 30, 1948," which is for the purpose of showing what the partnership books showed as the balance sheets at the various dates indicated on the schedule. [15]

The Clerk: Is this admitted, your Honor?

The Court: It may be received.

The Clerk: Plaintiffs' 18 in evidence.

(The document referred to was marked Plaintiffs' Exhibit 18 and was received in evidence.)

[See page 273.]

Mr. Diehl: Plaintiffs' 19 is a schedule entitled, "Analysis of Partners' Capital Accounts, Boston Shoe Company, October 1, 1943, to June 30, 1948," for the purpose of reflecting what the books showed as the partners' capital accounts between the two dates mentioned.

The Clerk: Is this admitted, your Honor?

The Court: It may be received.

The Clerk: Plaintiffs' 19 in evidence.

(The document referred to was marked Plaintiffs' Exhibit 19 and was received in evidence.)

[See page 274.]

Mr. Diehl: And Plaintiffs' 20 is a schedule entitled "Analysis of Partners' Drawing Accounts, Boston Shoe Company, October 1, 1943, to June 30, 1948," which schedule reflects what the books showed as to the drawings by the various partners.

The Clerk: Is this admitted, your Honor?

The Court: It may be received.

The Clerk: Plaintiffs' 20 in evidence.

(The document referred to was marked Plaintiffs' Exhibit 20 and was received in evidence.) [16]

[See page 275.]

Mr. Lund: We are ready for our first witness, your Honor, —Mrs. Smith.

The Clerk: Mr. Lund speaking.

The Court: As you know, gentlemen, I have been out of the district, and in addition to being a trial judge, I am also chief judge, and I have all sorts of matters to take care of, and the only time I have is during the recesses, so we will have a short recess.

(A short recess.)

The Court: All right, gentlemen.

Mr. Lund: Mrs. Smith, will you take the stand, please?

ROSE MAE SMITH

called as a witness on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Rose Mae Smith.

Direct Examination

Q. (By Mr. Lund): Will you keep your voice up, Mrs. Smith, so that we can hear you back here?

A. Yes, I will.

Q. Your address, please?

A. 2228 North Catalina Street.

Q. You are a plaintiff in this action, together with Mr. Jack Smith? [17]

A. That's right.

Q. And Mr. Jack Smith is your husband?

A. Correct.

Q. In what year were you married?

A. 1931.

Q. How old are you, Mrs. Smith?

A. That's a terrible question to ask me. 46.

Q. And how many children do you have?

A. Two.

Q. Their names, please?

A. Howard Samuel Smith and Barbara Ann Smith.

Q. When was Howard born?

A. Howard was born in '32.

Q. And Barbara?

A. She is 14. That is 1940.

Q. And they are both still living?

(Testimony of Rose Mae Smith.)

A. That's right.

The Court: Up to the time anybody is 50 the question of age is not embarrassing. After 50 it is.

The Witness: You mean even with a woman?

The Court: In court that may be very important. Otherwise your attorney would not have asked you the question.

Q. (By Mr. Lund): Mrs. Smith, I believe you are a partner today with Mr. Smith in the business known as the Boston Shoe Company? [18]

A. That's right.

Q. Going back prior to the time of your marriage to Mr. Smith, did you work for Mr. Smith in the Boston Shoe Company?

A. Yes, I did.

Q. In what capacity did you work, prior to your marriage?

A. Well, I did office work of all kinds, posting, answering the telephone, posting the ledger, making the bills.

Q. Approximately how long prior to your marriage were you working for Mr. Smith?

A. About six months.

Q. And after your marriage did you continue to work in the business? A. Yes, I did.

Q. Doing the same type of work?

A. Yes.

Q. On a regular daily basis?

A. That's right.

Q. And how long did that continue?

A. It has continued up until today.

(Testimony of Rose Mae Smith.)

Q. You will recall, Mrs. Smith, as the documents introduced indicate, that on December 31, 1942, Mr. Smith purchased from you your community property interest in the Boston Shoe Company. Do you recall that? [19]

A. That's right.

Q. Prior to the execution of that agreement and the sale of your community property interest to Mr. Smith, do you recall that you or Mr. Smith had had any disagreements or arguments about the interest that you had in the business?

A. Well, there weren't any arguments or disagreements, but I think that perhaps Mr. Smith would rather I wouldn't be a partner in the business.

Q. You apparently understood that Mr. Smith wanted his interest defined, and your interest defined?

A. That is correct.

Q. So that you sold to Mr. Smith your community property interest in the business for approximately \$100,000.00?

A. That is correct.

Q. What plans did you have, if any, at that time for the use of that money?

A. Well, at the time we thought that we wanted to set up trusts for the children, so that they would become independent, or, rather, set up something for them independent of us, so that if I wasn't here or my husband wasn't here that they would have a little something of their own.

We thought that if we gave them a gift, or set

(Testimony of Rose Mae Smith.)

aside money for them, or trusts,—we didn't know exactly how to work out the thing—we were getting advice from attorneys on how to set up something, but I know we wanted to set something [20] aside for the children, perhaps buy a piece of property for them, or do something for them, so that they would have something of their own. I didn't know how long I would be here, and I didn't know how long my husband would be here.

Q. You mentioned perhaps buying a piece of property for them. Was there any definite consideration given to that, investing in real estate for the children?

A. Yes, that's right. I wish we would have done it then. We looked at different pieces of property, but every time we looked at something, somebody told us, "This wasn't worth it, and that wasn't worth it," and by the time we turned around property had gone up.

And Mr. Smith or I—I thought to myself I didn't know anything about property, and I don't think my husband does either. The only thing he knows is the shoe business. So as a result we didn't buy any property. As the time passed by, we figured the only thing to do with the trusts—with the money we had given the children was perhaps to invest it in the Boston Shoe Company. That was the only way my husband knew how to make a living, and in investing it that way, and being trustees for them, we could oversee it and see that the trusts—that the business made money for them.

(Testimony of Rose Mae Smith.)

I know of no other outside way of making it. Neither does Mr. Smith know any outside way. At the time we had nothing, we had no property. We bought nothing because we [21] knew nothing about it, although we intended to.

Q. That is the next question. The documents introduced in evidence establish that you did create trusts, respective trusts for the two children in September of 1943. As of that time, did you, aside from these notes which you received from Mr. Smith in payment of your community property interest, did you personally have any property of your own?

A. No.

Q. Outside of this business, the Boston Shoe Company business, did Mr. Smith at that time have any property of any real value?

A. No, neither one of us had anything.

Q. At that time did the children have any close relatives from whom they could expect some substantial inheritance?

A. No. I am sorry, but I have no rich family, or rich relatives.

Q. The only means of providing for their future as of that date was whatever you or Mr. Smith could contribute to them?

A. That's correct.

Q. Prior to the creation of these trusts in September of 1943, had either you or Mr. Smith made any gifts to the children?

A. I think that there was a small gift of three or four thousand dollars, I don't recall, whatever the Government [22] allowed. I don't remember

(Testimony of Rose Mae Smith.)

how much it was, but you would have it there in the records, I do think.

Q. Was that a cash gift?

A. I believe so. I am not certain. The records will show that.

The Court: How was that money handled before you created these trusts? What did you do? Did you have a bank account in the children's names?

The Witness: Yes, there was a three or four thousand dollars set up in a savings account for each child.

The Court: And who had the power or the right to draw against it, you or your husband, or both you and your husband?

The Witness: The bankbooks,—neither one of us drew anything against them. The bankbooks, I think, were set up as Howard Smith or Barbara Smith, with us as trustees.

The Court: That is what I wanted to find out. Somebody has to have the power. The children didn't draw against them.

The Witness: Well, I assume——

The Court: At 11 and 3 they could not be entrusted with their own bank accounts.

The Witness: Yes.

The Court: I assume they are trusted now. How old are they now,—the children?

The Witness: My son now is 22.

The Court: Twenty-two. And the daughter? [23]

The Witness: And Barbara is 14.

(Testimony of Rose Mae Smith.)

The Court: Twenty-two and fourteen. So even before you created this trust you deposited this money to their names?

The Witness: We deposited money to their names.

The Court: Subject, of course, to your drawing for their benefit?

The Witness: That is correct.

The Court: All right. How did you handle the interest? You said the books would show. I am just trying to get this, but probably your attorney will bring it out.

The Witness: I don't know anything about the bookkeeping department there. I don't know about the interest on them. All I know is that we would each give them money, and it was set up in a savings account for them. Now, the rest of the bookkeeping——

Mr. Lund: Your Honor. I have the savings book here, if she may just look at it and refresh her recollection as to how it was set up.

The court wants to know the names of the accounts (handing books to the witness.)

The Witness: Here it is. Now I need my glasses. What is the printed part?

Mr. Lund: "Trustee for."

The Witness: "Rose Mae Smith, Trustee for Howard S. [24] Smith," and for Barbara.

Mr. Lund: And it shows how much in the original entry?

(Testimony of Rose Mae Smith.)

The Witness: The original entry was \$8,000.00. That was \$4,000.00 each for the children.

Mr. Lund: Thank you. And the date? Can you read that date?

The Witness: No, I cannot.

Mr. Lund: December 28, 1942. Is that right?

The Witness: I need my glasses. That is right.

The Court: How long does that precede the establishing of the trusts?

Mr. Lund: The documents show the trusts were set up September 29, 1943, and that is nine months later.

The Court: All right. I just wanted to find out.

The Witness: You see, our purpose, your Honor, was to set something away for the children.

The Court: That is right.

The Witness: You see, not knowing,—as I said before, not knowing what, or how to do it, we knew that we had to set something aside for them.

Mr. Lund: Mrs. Smith, now, wait for the questions.

The Witness: Yes.

The Court: All right, go ahead.

Q. (By Mr. Lund): From the time that you received the notes in September of 1942 from Mr. Smith for your community [25] property interest in the business up until the time that the written trust agreements were executed the following September, did you give serious consideration to investing on behalf of the children in real estate in Los Angeles? A. Yes, we did.

(Testimony of Rose Mae Smith.)

Q. That's all.

A. But it never went through.

Q. When the trusts were created in September of 1943, as you recall,—I think the records show, the documents show that—you gave to Mr. Smith in trust for Barbara one of the \$30,000.00 notes of Mr. Smith that you then had; is that correct?

A. That is correct.

Q. And you understood at the time of the creation of that trust that it was on an irrevocable basis?

A. That is correct.

Q. You were giving that up for all time, and giving up any control of that money for your own purposes?

A. That is correct.

Q. And the money could only be used for the children, according to the terms of the trust?

A. That is correct.

Q. You continued thereafter to provide for the children their education out of other sources of income, and didn't use any of the money in the trust for that purpose? [26]

A. Correct.

Q. Now, you recall that at the same time, or the documents I think are dated two days apart, that the trust was created and you entered into a partnership agreement with Mr. Smith and yourself, and with Mr. Smith and yourself also acting as trustees?

A. That's right.

Q. And that you purchased from Mr. Smith for \$60,000.00 through these notes you had a 30 per cent interest in the partnership?

A. That's correct.

(Testimony of Rose Mae Smith.)

Q. In the business that went into the partnership? A. That's correct.

Q. And that you also purchased from Mr. Smith a 15 per cent in the business for Howard, for whom you were acting as trustee?

A. That's correct.

Q. Do you recall that you received from Mr. Smith for Howard, the beneficiary, with you as trustee, \$30,000.00 in government bonds; is that correct? A. That is correct.

Q. And you, in turn, then gave those back to Mr. Smith for the purchase of the interest in the partnership? A. That's correct.

Q. Do you recall any particular reason why it was [27] finally decided to purchase an interest in the business rather than put the money for the children in real estate, or any other investment?

A. Well, as I said before, we looked at different pieces of property, business property, around the city, Los Angeles Street, through there, but not knowing much about it, we asked advice on it, and then by the time we could turn around, the property had gone up 25, 30 per cent, and we felt that not knowing anything about real estate, perhaps it wouldn't be a wise thing to invest in real estate, but to invest the money—at that time the business was a very lucrative one, we were making money then, and we felt that as long as we were trustees for the children, to invest our money in something which we knew how to make money at, and so we figured on the real estate, we didn't know anything about

(Testimony of Rose Mae Smith.)

it, it kept going up in price, and no one would give us any advice on it, so that we felt that perhaps it would be best to invest in the Boston Shoe Company. And that is why that was set up that way, because then my husband could supervise it, to the best of his ability, for the interests of the children.

Q. Do you recall whether you received advice from anyone at that time that you should make the trusts partners in the business, in order to save your own personal income tax liability on the share, the individual share of profits of [28] the business?

A. Well, I don't know anything about the taxes. I know that we were advised how to set up trusts by counsel, by law, but I don't know anything about the income taxes, or anything of that type.

Q. Well, do you recall or can you testify that these trusts were set up, and they became partners in the business, in order to create an estate for the children, or for the purpose of saving taxes?

Mr. Hochman: Your Honor, I object, that the question has been asked and answered, to the best of the witness' knowledge, and at this juncture it is only leading.

The Court: She may be asked that question.

The Witness: No.

The Court: The question may be asked as to her intention. Then when a person answers that it was not to evade taxes or to save taxes the answer is not necessarily binding on the court, because it must be considered against the background of the facts.

(Testimony of Rose Mae Smith.)

All right. Will you read the question, please?

(Question read.)

The Witness: No, they were set up primarily for an estate for the children, because when the children were born, we had always had that in mind. We didn't know exactly how to do it, or what to do, but we always thought of setting [29] something up for the children.

As I said before, my husband and I know nothing about real estate. He only knows the shoe business. We wanted to do something to protect the children. I didn't know how long I would be here, and I didn't know how long my husband would be here, and our purpose was taking care of the children, to see that they would have something.

The Court: All right. Since the son has grown up, has he taken part in the business at all, or what is his occupation?

The Witness: My son right now is continuing his education. He will be home in the next day or two. When he is home in the summer, he usually comes into the office and helps us out, but he is still going to school.

The Court: What school is he going to?

The Witness: Harvard.

Q. (By Mr. Lund): As I understand it, your son completed his undergraduate course at Stanford? A. That is correct.

Q. And is finishing his first year of graduate work at Harvard? A. That is correct.

Q. And when he is home during the summer

(Testimony of Rose Mae Smith.)

months and in the vacation periods, has he worked in the business then?

A. That is correct. [30]

The Court: I haven't had time to look at the trusts, but is there any provision made for any change of trusteeship upon either child attaining maturity, or is there any such provision?

Mr. Lund: The trust provides for the distribution beginning at the age of 25, when the child reaches 25, but there are provisions for anticipation of distribution set up on a formula basis beginning at the age of 21, and there are successor trustees named in the instrument, to whom I will refer and identify by another witness.

The Court: I see. All right.

Mr. Lund: That is all of this witness, your Honor.

The Court: Cross examine.

Cross Examination

Q. (By Mr. Hochman): Mrs. Smith, would it be true to say that the trust arrangements and the partnership arrangements, following so closely, I think a matter of two days, were done with the same thought and basically at the same time? I refer now to September 29, 1943, when the trusts were drawn up by yourself and your husband?

A. Well, this all took a period of time. You see, when the partnership was set up and the trusts were set up, we set money aside for the children, trying to see if we could invest in some other way,

(Testimony of Rose Mae Smith.)

but as long as we couldn't invest it in [31] outside real estate, we decided to invest right into the company.

Q. Now, then, you are the trustee, are you not, of the Howard Samuel Smith trust?

A. That is correct.

Q. And you are the grantor to the Barbara trust?

A. I don't know what you mean by "grantor."

Q. Well, you are the trustee,—to use another word, an administrator, so to speak?

The Court: There is no use of asking her. The documents show that. So let's get down to the matters that this witness can testify to. I presume she signed the documents when they were prepared by the lawyers at the time; isn't that true?

The Witness: That is correct, yes.

The Court: And, of course, the source of the money with which this trust was established was you and your husband?

The Witness: That is correct.

The Court: You put up the money?

The Witness: That's correct.

The Court: And you created the trust?

The Witness: That's correct.

The Court: All right.

Q. (By Mr. Hochman): The money that you gave to your daughter's trust, was it money that you put in, or did you [32] rather put in a promissory note? A. Those were notes.

(Testimony of Rose Mae Smith.)

The Court: Notes that your husband had given you?

The Witness: Given me for sale of my interest.

The Court: For your interest in the community property?

The Witness: For my interest in the community property, that's right.

The Court: All right.

Q. (By Mr. Hochman): You testified that your participation in the business was in the office, is that correct, as you have indicated before?

A. That is correct.

Q. In the period involved here, between 1942 to approximately 1948, when the children were small, were you then in full-time work in the office?

A. Yes, I was. I even did shipping, too.

The Court: Where is the business located?

The Witness: 826 South Los Angeles Street.

The Court: Is it a wholesale business?

The Witness: Wholesale, that is correct.

Q. (By Mr. Hochman): You spoke of purchasing property, perhaps. Where did you plan to get the cash for the purchase? You had a note that was not yet due. You had four notes, I believe, none of which were due.

A. Well, I will tell you something. At that time our [33] business was a very lucrative one. I had planned, and I knew the Union Bank & Trust Company would have given us money any time. My husband's name and reputation was very fine, and if we would have found a piece of property that

(Testimony of Rose Mae Smith.)

we had wanted, I am sure the bank—in fact, we figured that the bank would have given us the money for it.

Q. Do you know a Ben Breiman?

A. Yes, I do.

Q. Who is that gentleman, please?

A. My husband's brother.

Q. Was a loan given to Mr. Breiman in 1947 from the Howard Samuel Smith trust?

A. I don't know.

Mr. Hochman: I have no further questions, your Honor.

Mr. Lund: No redirect.

(Witness excused.)

Mr. Lund: Mr. Hartman.

LeROY E. HARTMAN

called as a witness on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: LeRoy E. Hartman.

The Clerk: The spelling of your last name?

The Witness: H-a-r-t-m-a-n. The LeRoy is capital "R," sir. [34]

Direct Examination

Q. (By Mr. Lund): Your address, please, Mr. Hartman?

A. 2224 Electric, in Alhambra.

(Testimony of LeRoy E. Hartman.)

Q. Are you employed by the Boston Shoe Company? A. I am.

Q. And in what capacity?

A. Well, as a more or less general manager and accountant.

Q. How long have you been employed in that business?

A. Since July 9, 1938, other than the time I spent in the Armed Service.

Q. You mentioned as an accountant. Are you an accountant by profession or training?

A. No, sir.

Q. But you do bookkeeping?

A. I do bookkeeping.

Q. In that capacity do you have custody of the books and records of the Howard Samuel Smith trust and the Barbara Ann Smith trust?

A. I do.

Q. At our request, did you prepare from those records a summary of the receipts and disbursements and investments of each of those trusts?

A. I did. [35]

Mr. Lund: I might mention, your Honor, counsel has copies of these documents.

Q. (By Mr. Lund): I show you a document headed, "Schedule of Receipts-Disbursements-Investments, Howard Samuel Smith Trust, December 28, 1942, to December 31, 1948," and ask you if you prepared that document accurately from the books and records of the Howard Samuel Smith trust.

(Testimony of LeRoy E. Hartman.)

A. Yes. These reflect exact entries on the books of the Howard Smith trust.

Q. And will you tell us what these various subdivision breakdowns are in this document of three pages? I don't mean the detail of each entry, but it is broken down into two or three parts.

A. The first page shows the receipts into these trust funds, as to where the money came from, and also the disbursements, as to what was paid out of this trust fund.

The second page shows the schedule of investments, and it shows how the money from these trusts were invested, and the third page is a continuation, of course, of the second page.

Q. Now I show you a similar document headed, "Schedule of Receipts-Disbursements Barbara Ann Smith Trust, December 28, 1942, to December 31, 1948," and ask you if you prepared that document.

A. Yes, I did.

Q. And it is an accurate transcription of the books and [36] accounts of the Barbara Ann Smith trust? A. Yes.

Q. And it shows the same information as the one you just testified about from the Howard Samuel Smith trust? A. That is correct.

Mr. Lund: We offer at this time the document pertaining to the Howard Samuel Smith trust as our next exhibit in order.

The Court: It may be received.

The Clerk: Plaintiffs' Exhibit 21 in evidence.

(Testimony of LeRoy E. Hartman.)

(The document referred to was marked Plaintiffs' Exhibit 21 and was received in evidence.)

[See pages 276-7.]

Mr. Lund: And we offer as the next exhibit in order the schedule concerning the Barbara Ann Smith trust.

The Court: All right.

The Clerk: Plaintiffs' Exhibit 22 in evidence.

(The document referred to was marked Plaintiffs' Exhibit 22 and was received in evidence.)

[See pages 278-9.]

Q. (By Mr. Lund): Mr. Hartman, will you explain to us from these documents what the assets of the Howard Samuel Smith trust were as of December 31, 1948?

A. The assets of the trust fund?

Q. Yes.

A. Yes. There was an item, a savings account in the Union Bank & Trust Company—no, that was cleared up. Pardon me. [37]

There were savings bonds, that is, U. S. Series E savings bonds in the total sum of \$7,500.00.

Q. In what name were those bonds carried?

A. That is in the name of—let's see. This is Howard—it would be Howard Samuel Smith, or, Rose Mae Smith as trustee for the Howard Samuel Smith trust.

Q. All right. What other assets?

A. Then there were savings accounts in dif-

(Testimony of LeRoy E. Hartman.)

ferent Federal Savings Banks. As an example, Coast Federal, there was \$5,060.44; in the Republic Federal Savings there was \$5,060.43; in the Western Federal Savings & Loan there was \$4,389.76.

Q. In what name were those accounts carried?

A. Those were in the name of Rose Mae Smith, as trustee for the Howard Samuel Smith trust. Then there was the investment in the Boston Shoe Company, which showed at December 31, 1948, \$30,181.10.

Q. Thank you. Just briefly in the same manner tell us the assets as shown on the records of the Barbara Ann Smith trust as of December 31, 1948.

A. There were Series E U. S. savings bonds in the amount of \$7,500.00, and in savings and loans accounts there were Coast Federal Savings & Loan Association, \$4,060.00; the Home Building & Loan Association, \$4,060.00; Los Angeles Federal Savings, \$4,199.36; Standard Federal Savings & Loan, [38] \$4,246.25; and in the investment in the Boston Shoe Company of \$35,979.67.

Q. Now, the Series E bonds, and the savings and loan accounts were in what name?

A. They were in the name of Jack Smith, as trustee for the Barbara Ann Smith trust.

Q. Now, do you know if these savings accounts have continued right up to the present date?

A. Yes, they are still there.

Q. And both trusts still have bonds?

A. Still have bonds; the same bonds.

(Testimony of LeRoy E. Hartman.)

Mr. Lund: That is all, your Honor, of this witness.

The Court: All right. Cross examine.

Mr. Hochman: One or two questions, your Honor.

Cross Examination

Q. (By Mr. Hochman): Mr. Hartman, Exhibits 21 and 22 are the complete assets of the trusts, are they not, to your knowledge, as reflected in the books?

A. That's right, to my knowledge.

Q. There are no other properties, real estate or anything else, that is reflected, to your knowledge?

A. No.

Q. Who pays for your services in regard to the keeping of these trusts? [39]

A. It is a part of my job.

Q. With the Boston Shoe Company?

A. With the Boston Shoe Company, that is right.

Mr. Hochman: No further questions.

The Court: All right.

Mr. Lund: I have a short redirect, your Honor, in view of counsel's questions.

The Court: Go ahead.

Redirect Examination

Q. (By Mr. Lund): You testified that those are the complete assets of each trust as of the dates shown. Is that so far as the books and records are concerned?

(Testimony of LeRoy E. Hartman.)

A. So far as the books and records are concerned.

Q. Do you know of any additional assets or claims that the trusts have?

A. Yes, I think there is an error on them. I believe there is a liability—or, I mean an asset in overfiguring of the taxes. The taxes have been figured wrong, and there is a sum of money due the trusts for that overassessment of taxes.

Q. Due from Mr. and Mrs. Smith to the trusts?

A. Due from Mr. and Mrs. Smith, that's right.

Mr. Lund: That is all.

Mr. Hochman: No further questions, your Honor.

The Court: All right.

(Witness excused.)

Mr. Lund: Mr. Smith.

JACK EDWARD SMITH

called as a witness on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Jack Edward Smith.

The Clerk: Edward?

The Witness: Yes, E. Smith.

Direct Examination

Q. (By Mr. Lund): Your address, please, Mr. Smith?

A. 2228 North Catalina Street.

Q. And you are a plaintiff in this action, together with Rose Mae Smith? A. Yes, sir.

(Testimony of Jack Edward Smith.)

Q. What is your age, please, Mr. Smith? Your age? A. Fifty-nine, about.

Q. Now, you are in the business of the Boston Shoe Company? A. Yes, sir.

Q. How long have you been? Well, first, tell me what is the nature of that business.

A. Wholesale and distribution of shoes. [41]

Q. And you are located in Los Angeles?

A. 826 South Los Angeles Street.

Q. How long have you been in that business in Los Angeles?

A. In the City of Los Angeles?

Q. Yes. A. Since 1925.

Q. Prior to that time were you in the business?

A. I was in the business in Massachusetts, sir, at Lowell.

Q. Since what date, approximately?

A. Actively for myself since 1919, sir.

Q. Is it a fair statement to say that almost all of your working life has been devoted to this type of business? A. Yes, sir.

Q. You recall, as these documents show, on October 1, 1943, you formed a partnership with your wife and yourself and the two trusts in the business? A. Yes, sir.

Q. For the years immediately preceding that, how was the business conducted,—as a partnership, individual proprietorship, or corporation, or how?

A. Individual ownership.

Q. That is solely and entirely by yourself?

A. That's right. [42]

(Testimony of Jack Edward Smith.)

Q. Prior to December 31, 1942, your wife had some community property interest, however, in the business; is that correct? A. Yes, sir.

Q. Is the shoe business the only business that you have been engaged in in the last years?

A. Practically the greatest part of my life. I am considered a man that knows shoes.

Q. During the 1940's were you engaged in any other type of business? A. No.

Q. Is that true today? A. Yes, sir.

Q. Based upon your experience and knowledge in this business, how essential do you believe the invested capital is to a successful operation of the business?

A. In our type of business capital is very essential, because we anticipate a lot of purchases in advance.

Q. You carry a large inventory?

A. Yes. We buy white shoes for spring in August, and they come in in October and November.

We buy fall shoes, like work shoes, in January and February, and we give long datings to customers. We give them a seasonable dating, and they can buy slippers, Christmas slippers, in January, and then they come in in February and March. [43]

Q. Is it true, then, that at all times you need capital?

A. We always need a lot of capital, yes.

Q. What prompted you to purchase your wife's community property interest in the Boston Shoe Company?

(Testimony of Jack Edward Smith.)

A. Is that an essential question, Mr. Lund?

Q. You don't understand it?

A. I mean, is that an essential question?

The Court: Of course, it is essential.

The Witness: Well, there is a lot of family reasons, your Honor.

The Court: But they have to be brought out. It is too bad, but the Government is not suing you. You are suing the Government for some \$115,000.00, and you are basing it on the contention that you entered into a partnership with your wife, and you paid her a lot of money, and then that was transferred to your children, and the whole thing has to be gone into to see if it is a real partnership, and what were the facts behind it.

In all these cases—this is just one case—I have told you I handled, so far as I know, a half a dozen of them, and at least three of them were appealed.

The Witness: Well, it is a little private.

The Court: Whenever a person comes into court and sues anyone, all the actions relating to the transaction must be [44] brought out. The answer is, if you did not want that, you did not have to sue the Government. You could just forget about the \$115,000.00, but you brought a suit, and you are seeking to recover the money.

Your lawyer would not ask you these questions if they were not material. I am just trying to help your lawyer out.

The Witness: I know you are, your Honor.

(Testimony of Jack Edward Smith.)

Mr. Lund: I might say, Mr. Smith, we are not asking for all the details.

The Witness: There had been quite a lot of disagreement between Rose and I prior to that, particularly about the amount of charity that I used to give away. She thought it was too much, to the point that I wasn't home for Christmas and New Year's in '42. Does that tell you enough, or would you want to know more?

Q. (By Mr. Lund): At least, the two of you were not in agreement?

A. We were not in agreement for quite a while. She felt that she was working, and she has got—she didn't agree with the Government. She thought she had a half, and I was doing too much of it, giving it away, I was giving it around. So Gittelson and I figured out a way that we can pay her out, and give her a big interest. We paid her 10 per cent interest, I believe, on our notes, instead of the normal interest. [45]

The Court: Well, you owned the business, however, before you were married?

The Witness: On community property, your Honor.

The Court: I know, but you owned the business before you married her?

The Witness: Yes, I did, but after she came into the business, that had nothing to do with the case, she was supposed to be a partner.

The Court: Oh, that isn't the point. We will

(Testimony of Jack Edward Smith.)

decide that. You owned the business before you married,——

The Witness: That's right.

The Court: ——the present Mrs. Smith?

The Witness: That's right.

Q. (By Mr. Lund): As of the time you married Mrs. Smith, you owned the entire business as your sole and separate property?

A. That's right.

Q. However, for the next 11 years after you were married, you contributed services to the business which created in Mrs. Smith a community property interest to the extent of half the value of your services; is that correct?

A. That's right. But you must remember she worked too, sir.

Q. Well, then, that worked both ways?

A. Yes.

Q. The net result of which, as of December 31, 1942, [46] was that both you and she felt it desirable to separate her interest and your interest; is that correct?

A. I felt that way, sir, yes.

Q. Then it was your personal desire to spell out her interest and pay off for her community property interest, so that the business from then on would be your sole and separate property; is that right?

A. That's right.

The Court: What did you value the business at the time you gave her \$100,000.00 in notes? Was that the amount?

(Testimony of Jack Edward Smith.)

Mr. Lund: Just a few thousand over. \$102,000.00.

The Court: What did you figure the value of the business to be?

The Witness: If I remember right, your Honor, —I am a businessman, and I took advice of good lawyers, and the accountants, and we figured what the business was, what actually was there, and other considerations. It is such a long time, 11 years,——

Mr. Lund: You haven't answered the judge's question. Do you recall what you valued the business at at the time?

The Court: What did you value the business at at the time you bought her out for \$102,000.00?

The Witness: We valued everything she had there, with the exception of my separate property.

Mr. Lund: You still haven't answered the question.

The Court: The business was yours, except such as you [47] contributed to it through your earnings,——

The Witness: Yes, sir.

The Court: ——through running it, and that became community property?

The Witness: That's right.

The Court: All right. Now, you said she felt, because she worked in the business for a number of years, that she had a community interest?

The Witness: Yes.

(Testimony of Jack Edward Smith.)

The Court: And you bought her out at \$102,000.00?

The Witness: Yes.

The Court: Now, the question I am asking is: What did you figure the value of the entire business to be, from which you carved out this \$102,000.00 interest?

The Witness: I would have to look at the records, sir. I don't remember. I can't remember. We figured it at more than \$102,000.00. We paid her double, and I think we valued it at a little more than that amount. I don't remember.

The Court: You didn't give her the entire value of the business, did you?

The Witness: No.

The Court: Just her interest?

The Witness: I gave her her interest only.

The Court: And what about your interest? What did you value your interest to be? The same as hers? [48]

The Witness: No, a little more, your Honor, because I had a certain amount of separate property before I married her.

The Court: Now, what was that amount, do you know?

The Witness: I don't remember, your Honor.

The Court: I see. All right.

Mr. Lund: Your Honor, we have a statement as of June 30, 1942, which I presume would be pretty close to the figures. I will show it to counsel, and maybe we can introduce it.

(Testimony of Jack Edward Smith.)

The Court: All right. Evidently he doesn't remember.

The Witness: I don't remember the exact amounts, sir.

The Court: All right.

Mr. Lund: Your Honor, I think counsel would stipulate that the records of the company show that as of December 31, 1942, the total capital recorded was \$254,277.68. Do you so stipulate?

Mr. Hochman: So stipulated, your Honor.

The Court: All right.

Q. (By Mr. Lund): For her community property interest in the business, at that time you gave Mrs. Smith some notes? A. Yes, sir.

Q. Do you know whether or not those notes could have been cashed at any bank?

A. Yes, she could have gone to the Union Bank and cashed them very easily.

Q. The Union Bank, you say? [49]

A. Yes, sir.

Q. Were you at that time doing business with the Union Bank? A. Yes, sir.

Q. Have you all the years?

A. I think since 1930. Since 1930.

Q. As of that time, or thereabouts, had you had any plans to make any gifts to your children?

A. Yes, sir.

Q. When did you first have such plans, approximately?

A. Well, we had the plans for a long time. On or about 1941 we felt that we were financially a

(Testimony of Jack Edward Smith.)

little bit stronger, you know, and we could spare larger gifts to our children, and we started about that time to negotiate with our counsel, to plan a will, an entirely family setup, or trusts, where, as a part of my will, sir,—if I may say now, it was entire family plan to provide for the children. We got Barbara in 1940, and became concerned, because I am about 45 years older than Barbara, and——

Q. Well, in any event, in 1942, I believe the passbook indicated you gave a gift of \$4,000.00 to the children? A. That's right.

Q. And as of that time you had been and were discussing with your counsel a means for creating gifts for the children? [50]

A. That's right, sir.

Q. As of that time, the first of 1943, what thoughts, if any, did you have, or discussion with your counsel, relative to how you would invest the gifts for your children?

A. Well, at that time we were real estate-minded. When we planned originally, Rose was going to go into the real estate business, and the money that we would give the children we would invest in real estate, also, sir.

Q. Was there any particular reason that you can recall why you abandoned the idea of investing in real estate?

A. Well, at that time it required—the business required a lot of my time. I used to go back east very often, between seven and eight times a year,

(Testimony of Jack Edward Smith.)

by train, not always being about to get back on time on account of accommodations, you know. You remember those days.

Q. Traveling was pretty bad?

A. Yes, and I was out. Our salesmen left us, and I covered territory, and time went too fast, and I didn't have a lot of time to investigate the propositions they brought to us.

Q. Did you have specific propositions brought to you to invest in real estate on behalf of the children?

A. Yes, sir. It was so well known, even before the trusts were formed, and everybody in the city already knew that we had the trusts, and real estate men, and insurance men, [51] everybody approached us, to the point where we had to get men out of the place so they wouldn't disturb us.

Q. Did you actually look at physical sites of property for investment?

A. Yes, we did. We did. We looked at a lot of them.

Q. Do you know of any relatives that either of the children have, other than you and Mrs. Smith, from whom they could expect an inheritance?

A. None, sir.

The Court: You didn't expect them, on growing up, to go into the business?

The Witness: Yes, I did. I expected my son to be in it.

The Court: But he isn't?

The Witness: Well, he is still young, sir. He is

(Testimony of Jack Edward Smith.)

only 22. He hasn't finished his education, and he is a good kid, so we don't want to disturb him.

Mr. Lund: You still have some hopes or expectations that he will get into the business?

The Witness: I hope.

The Court: What is he doing at Harvard? What is he specializing in? What is his major? What was his major at Stanford? Tell me what his major was, and I can draw the inference. What was his major at Stanford?

The Witness: He started with law, and he shifted to chemistry, and now he is going back to law. [52]

The Court: Now he has gone back to law?

The Witness: Yes, sir.

The Court: He is going to Harvard Law School now?

The Witness: He is accepted into Harvard Law School now.

The Court: All right. And you think he is going to go into the shoe business?

The Witness: I think he will. Like all lawyers, I think he will eventually end up——

The Court: Then I think you are sending him to the wrong school. A man with a Harvard law degree is not going into the shoe business. He will be too proud of his Harvard degree to go into the shoe business. He may be different.

Mr. Lund: I was kind of amused, your Honor, because I am a Harvard Law School graduate, and

(Testimony of Jack Edward Smith.)

I am amazed at the number of my law school classmates who have gone into business.

The Court: Perhaps he is different. Let's go on.

Q. (By Mr. Lund): As of the first of 1943, and just prior to the time in 1943 that these trusts were created, you had, I believe, some bonds. Do you recall that in creating the trusts, you gave \$30,000.00 in bonds to Mrs. Smith in trust?

A. Yes, I gave Mrs. Smith \$30,000.00.

Q. And you had some other bonds, you recall, at that time?

A. Yes, we had additional bonds besides those we gave out. [53]

Q. Do you recall, roughly, how much you had in bonds?

A. I don't. I would have to look at the records.

The Court: I forget, but was it \$30,000.00 for each?

Mr. Lund: \$30,000.00 for each.

The Witness: Yes, we had a lot more than that. We had a lot more bonds than that.

Q. (By Mr. Lund): You gave in trust for Howard \$30,000.00 of those bonds; is that correct?

A. Yes.

Q. And Mrs. Smith gave in trust to you for Barbara——

A. The note.

Q. ——the \$30,000.00 note; is that correct, sir?

A. That's right.

The Court: After the surrender of those, you still say Mrs. Smith continued as your partner?

(Testimony of Jack Edward Smith.)

The Witness: After the surrender of what, your Honor?

The Court: Of the bonds, and the cancellation of the notes? Mrs. Smith continued as a partner in the business after the children came in as partners?

The Witness: She came back as a partner. There was quite a little unhappiness because she was no partner, so she came back again.

The Court: So she came back again?

The Witness: I had to take her back again.

The Court: That is right. So that you bought her out? [54]

The Witness: I had to take her back again.

The Court: And when you took her back again, she was an equal partner, except as to such portion as the children received?

The Witness: No, she was not an equal partner; only a partner for 30 per cent.

The Court: And what part was your share?

The Witness: I was 40 per cent, my wife was 30, and the children were 15 per cent each.

The Court: All right. I think this is a good place to stop. I wanted to reach a good stopping point. We will adjourn until 2:00 o'clock.

Mr. Lund: Fine.

(Whereupon, at 12:10 o'clock p.m., a recess was taken until 2:00 o'clock p.m. of the same day.) [55]

The Court: All right, gentlemen, cause on trial.

JACK EDWARD SMITH

called as a witness on behalf of the plaintiffs, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination—(Continued)

Q. (By Mr. Lund): Mr. Smith, in September of 1943, when you gave three \$10,000.00 bonds to Mrs. Smith in trust for your son Howard, did you have any other assets of substance outside of your business?

A. We had some bonds; a few bonds.

Q. Do you have a recollection, roughly, what they amounted to? A. No, I don't.

Q. Well, are we talking about \$100,000.00, \$5,000.00, or \$25,000.00, or what?

A. No, they didn't go into the hundreds of thousands. We had a few bonds.

Q. Do you recall that in December of 1942 you gave a \$4,000.00 gift to each one of your children?

A. Yes, I do.

Q. That was cash, was it? [56]

A. Yes, I believe it was cash, yes. It was checks.

Q. How long, if you recall, prior to September of 1943, when this trust was created, had you been planning and discussing and trying to arrange some gifts for your children?

The Court: I think he talked about the real estate venture. Didn't you go into that this morning?

The Witness: He is asking how long before.

Mr. Lund: I didn't think I had covered it with

(Testimony of Jack Edward Smith.)

this witness, your Honor. Mrs. Smith did testify in some detail, your Honor.

The Court: Oh, I thought he said, too, that it was even before they started the trusts he went to real estate men.

Mr. Lund: You are right, your Honor. I believe the witness testified that he went out and looked at some properties.

The Court: I merely want to avoid repetition.

Q. (By Mr. Lund): You did testify that you looked at some real estate property, didn't you?

A. Yes, but it was quite a long while before '42. I mean it was quite a long while.

Q. Between the time of the December 1942 purchase by you of your wife's community property interest in your business, and the time of the creation of the trusts on September 29, 1943, were you still thinking of the possibility of investing some of the money in real estate for your children?

A. Yes, we did, but it was—— [57]

Q. What was the purpose of creating this trust for your son?

A. To create something for the next generation, for my son, so that if anything happens to him like happened to me, that he wouldn't be destitute.

Q. Who is Mr. Gittelsohn that you referred to?

A. Mr. Gittelsohn is our family and business counsellor.

Q. How long has he been? Is he an attorney?

A. At least since 1938.

Q. He is an attorney in Los Angeles?

(Testimony of Jack Edward Smith.)

A. Yes, he is an attorney.

Q. Is he, so far as you know, a tax specialist?

A. No; no.

Q. Then you consulted him in connection with these transactions, and the purchase?

A. We consulted him for a will, and the setting up of the trusts.

Q. And the partnership?

A. The partnership that has—you mean the new partnership, with the children, you are talking about?

Q. Yes, in September and October, 1943.

A. Yes, we consulted on everything, that's right.

Q. Is it your testimony that about the time you entered into the trust agreements you executed a will?

A. Yes, it was a part of a family arrangement.

Q. Now, I believe the instruments show that you gave to Mrs. Smith in trust for your son Howard three \$10,000.00 bonds. A. Thirty?

Q. Three \$10,000.00 bonds; is that correct?

A. That's right.

Q. And you understood that that gift was on an irrevocable basis, that you could not touch it for your own purposes?

A. That's right. We understood that it was irrevocable.

Q. Was there any effort to keep secret the fact that you had entered into this trust agreement?

A. No. We consulted with Mr. Cameron of the Union Bank practically for years, sir, to set up our

(Testimony of Jack Edward Smith.)

family affairs, and he may have recommended something like that before we even went to Gittelson, from the trust department.

Q. Did you at any time mention to either one of your children that you and your wife had established a trust for them?

A. We did. We told them practically everything.

Q. Your daughter in 1943 was only about three years old, as I recall?

A. Well, when she heard Howard ask something, she usually asked something too, if she has got something too.

Q. Have you ever had occasion to discuss with your son Howard his trust, so to speak? [59]

A. Yes, sir, we often did.

Mr. Hochman: We object, your Honor, as to the comments of the son. That would be hearsay.

The Court: Overruled.

The Witness: Shall I say?

The Court: Go ahead.

The Witness: Yes, I have talked to Howard many times. I think when he was about 17, when he entered college, he asked me when he could be able to use his own money, and I told him to read the trust. I don't know whether he did or not, but I told him that we had a copy at home and he could read it. I believe he did.

Q. (By Mr. Lund): As of the time this trust was created in September of 1943, did you or Mrs. Smith have any close relatives in Los Angeles?

(Testimony of Jack Edward Smith.)

A. Yes, I have a brother and a brother-in-law, and Mrs. Smith has a brother.

Q. Had any of those as of that time been successful in business? A. No.

Q. Did you have any relatives that either of you had confidence in?

The Court: I believe you asked him that this morning. You asked about whether he had any relatives from whom they might inherit. You asked him that this morning. [60]

The Witness: No.

Mr. Lund: I am developing now as to the relatives on the question of their possibility as trustees.

The Court: Oh, go ahead.

Q. (By Mr. Lund): Were there any relatives in Los Angeles in whom you had confidence to handle the funds of the trusts?

A. No. I had to assist most of them.

Q. You had to assist them financially?

A. Yes, most of them. They had a hard time.

Q. Who is Ben Smith?

A. Ben Smith is my brother.

Q. And I believe he was named in the trust instrument as an alternate?

A. As an alternate, yes.

Q. And who is Mr. Ben Finkle?

A. Ben Finkle is a perfect stranger. He was an accountant at the time for the Boston Shoe. He is associated with Mike Pritkin, and he is one of the accountants, or junior partners. Not having anybody else, we put him in.

(Testimony of Jack Edward Smith.)

Q. He was no relative of yours?

A. No relative at all.

Q. He was just a personal friend?

A. Just a paid employee.

Q. Can you tell us why it was ultimately decided by [61] you and your wife to put the gifts which you were going to make your children in trust in an investment in the business, by way of creating the partnership?

A. There is a little tie-in to this. I had to take my wife back as a partner. She was very unhappy when she was out, and when we started discussing that, why, it sounded all right to take in and to form, to get the whole family into it, and that was part of the plan. That is how we came to form the family partnership.

Q. Did you discuss or seek advice from Mr. Gittelson, or Mr. Cameron of the Union Bank as to how——

A. I have talked to Mr. Cameron——

Q. Wait until I finish the question—as to how you should invest any gifts which you made to your children?

A. Yes, we did. We were even going to buy Union Bank stock with it. If you want to go in and explore the whole thing, it is years of thinking. We had a lot of investments in mind.

Q. Did any of those advise you against putting the trust into the partnership?

A. No, sir, they all recommended it. I talked to the president or the vice president of the Union

(Testimony of Jack Edward Smith.)

Bank. I don't remember now whether he was president or vice president, but he was a close friend of mine.

I talked to Mr. Lippman about it, and Mr. Lippman knew [62] months before,—I mean months, it would be many months before, of our plans and he recommended it.

The Court: But you used your own judgment at all times as to what to do with the money in the fund?

The Witness: Yes, I finally made my own mind up. I thought it was all right.

The Court: I notice there are some stocks of building and loan companies which are in the portfolios, as it were, of each of the trusts. Now, you used your own judgment in taking the funds and investing them in that way in that kind of security; isn't that true?

The Witness: Not all my own. Mr. Hartman discussed a lot of that. Mr. Hartman picks them out, and he asks me, and I say it is all right. Sometimes he picks a company that I——

The Court: Did I understand—you didn't say, but I think your counsel said this morning that you have not used any of the interest on the securities in the portfolios. You know what I mean by the portfolios?

The Witness: Yes, I know.

The Court: The bankers use the expression.

The Witness: I know that. I understand you.

(Testimony of Jack Edward Smith.)

The Court: You are carrying an account, in other words, that has so many things in it?

The Witness: We are trying to create a portfolio right now. I understand you, sir. [63]

The Court: All right. Now, as the moneys came in, you used your own judgment as to whether to leave them in the bank, or how much to leave, and what to invest elsewhere?

The Witness: I accepted the responsibility, but it was usually done by Mr. Hartman.

The Court: Now, your son, since he has become of age, has not been consulted as to what has been done with your money, is that correct?

The Witness: No, he has not been consulted.

The Court: And you, being the good father that you are, have paid for his education?

The Witness: Yes, sir.

The Court: Out of your own funds?

The Witness: That's right.

The Court: And you have not drawn on these funds?

The Witness: No, sir.

The Court: And you do not intend to charge his estate with the cost of his education?

The Witness: No, sir.

The Court: But he has no power to draw against it?

The Witness: No, sir.

The Court: And your daughter has not, because she is not of age?

The Witness: No.

(Testimony of Jack Edward Smith.)

The Court: But he, even though he is of age, cannot [64] draw on it?

The Witness: He can't until he is 25.

The Court: I believe you said that when he became 25 years of age there is some provision as to how he can draw it all out?

The Witness: No, part of it. It was Mr. Cameron's idea at 25, 30, 35, 40, and if he doesn't know what to do with it after 40, why, he is not responsible for it.

The Court: I see. You finally decided to terminate the trust when he is 40?

The Witness: Forty. If he doesn't know what to do with it at 40—why, I mean I didn't decide. That was the advice we received.

The Court: All right.

Mr. Lund: Along the lines of your Honor's inquiry, within the last year or so——

The Court: As I say, gentlemen, I am at a disadvantage. I haven't had the time to look at the exhibits. It may be that it is in the trust, but, as you know, these were only introduced today, and I have been too busy with other matters to be able to read them. I will read them in due time, but, as I say, I am propounding these questions on the basis of what you have told me is there. I haven't read them myself.

Q. (By Mr. Lund): Within the last year or so, have you and/or your wife made gifts of cash to your son Howard? [65]

(Testimony of Jack Edward Smith.)

Mr. Hochman: I object, your Honor, as to what is being currently done as not important.

The Court: No, the entire relationship may be gone into. Go ahead. You may answer.

The Witness: When Howard graduated from Stanford, we each gave him a \$3,000.00 gift, and I believe it was so reported.

Q. (By Mr. Lund): That was about a year ago?

A. A year ago, when he graduated from Stanford.

Q. Now, at the time you mentioned Mr. Cameron and Mr. Gittelson, you were talking to them——

A. And Mr. Lewis from the Union Bank.

Q. ——you were talking to them about your future plans for your children, and so on, and did any of those gentlemen you were consulting advise you you should create a trust and make the trust partners in your business in order to avoid or save income taxes?

A. No, the income taxes was not an issue concerned.

Q. Well, was that done, was the trust created and the trust made a partner in the business for the purpose of saving you individual income taxes?

A. That was not the consideration, sir. It may have been explained that it might save, but that was not our consideration for creating the trust.

The Court: But 1942 was the beginning of the high surtax, [66] the wartime period, wasn't it? You knew that, didn't you?

(Testimony of Jack Edward Smith.)

The Witness: I believe at that time taxes became high.

The Court: It began in 1940, or I believe the first one was in 1941, and in 1942 they began to impose them. You see, in 1942 we were already in the war, and in 1940 they began thinking about it, so the high tax periods began around that time; isn't that true? Isn't that your recollection?

The Witness: Your Honor, when I talked to Billy Lewis of the Union Bank, who was a good friend of mine, and I talked to these people before I came to Gittelson, I went to them for first advice, and the proposition of taxes was not considered by either one of us with these two gentlemen.

The Court: All right.

Q. (By Mr. Lund): What was the purpose, then, of making the trusts partners in the Boston Shoe Company's business?

A. Well, the money began to be needed. My statement didn't balance very good, if I remember right. I am giving you the best of my recollection. I needed money back in my business. I think my liabilities were a little bit out of balance, I showed too many liabilities against assets, and we needed a little bit more capital in the business, too, and it would have helped. And at that time I had an idea that we will be the outstanding distributors on the West Coast, we [67] will cover all the 11 states, and the more money we will have, the more business we can do.

(Testimony of Jack Edward Smith.)

The Court: How were you getting money for the creation of this trust?

The Witness: Well, first we were going to give it to the kids, and then we thought we could invest it well in our own business.

The Court: Taking back your own money; is that it? You didn't bring in any outside money?

The Witness: Well, we gave it away to them, and we brought it back again.

The Court: I see. It was that way.

The Witness: That's the way we were advised to do it.

The Court: And you paid your wife \$100,000.00, and then took her back as a partner?

The Witness: Took her back as a partner.

The Court: All right.

Q. (By Mr. Lund): At that time the business was reasonably prosperous?

A. Yes, we were making money at that time.

Q. And you were expecting it to continue to be reasonably profitable?

A. That's right. I took in another partner. I took in Herman.

Q. We will come to that in a moment. From time to time [68] during the period from 1943 to 1948 did the business borrow short-term loans from the bank?

A. Yes, I think we went in quite often for money.

Q. In connection with those borrowings, did the

(Testimony of Jack Edward Smith.)

bank receive copies of the trust instruments and the partnership instruments?

A. Yes, sir. The bank was always—I think the bank received a copy as soon as the trust was formed, sir, I believe.

Q. Of both the trust instruments and the partnership instruments?

A. Yes, sir, I think they had the whole thing. As I remember, when we went to them, we made out a separate account for Jack Smith, a separate account for Rose Smith, a separate account for Jack Smith, trustee for Barbara, a separate account for Rose Smith, trustee for Howard, and all that was discussed with bank officials.

Q. Beginning from the time of October 1, 1943, when the partnership was formed, were your insurance contacts and other instruments written in the names of the four partners, yourself, Mrs. Smith, and your son and daughter?

A. Everything was changed. The name was registered in the county. The trade name, Boston Shoe Company, was registered under all the four names.

Q. And the insurance and all the other contracts? [69]

A. Everything was properly changed. We did everything that we were advised.

Q. How about your trade customers, and so on? Did they have any knowledge of the change in your nature of doing business as a partnership?

A. Some of them did, and it was spoken about, but most of our suppliers knew about it.

(Testimony of Jack Edward Smith.)

Q. Now, who is Mr. Herman Weishaupt?

A. Mr. Herman Weishaupt was an employee of the Boston Shoe Company.

Q. For how many years prior to 1945?

A. He started on or about 1933.

Q. And going into 1945, what was his capacity? Just prior to the year 1945, what was Mr. Weishaupt's capacity?

A. He was some sort of an assistant to me in buying and supervising.

Q. And he came in as a partner as of January 1, 1945; is that correct? A. That's right.

Q. With a 10 per cent interest?

A. A 10 per cent interest.

Q. And that partnership continued up until June 31, 1948? A. That's right.

Q. Now, subsequent, and from the period of June 31, [70] 1948, on to the present time, you have continued the partnership, with you, and your wife, and yourself and your wife as trustees?

A. Yes, sir.

Q. And the respective interests of each of those four partners is what since 1948?

A. It is separate and distinct. Each one gets his own.

Q. What are the partnership interests?

A. It is 40, 30, 15 and 15.

Q. You have 40, Mrs. Smith 30, and each of the trusts 15; is that correct? A. That's right.

Q. And that is true from July 1, 1948, up to the present time? A. That's right.

(Testimony of Jack Edward Smith.)

Mr. Lund: That is all.

The Court: Just before the cross examination begins, I want to ask one question as soon as I get some of the dates on some of these exhibits. Just a moment.

Is this declaration of trust, which is Exhibit 7, dated September 29th, is that the final form, or is that the——

Mr. Lund: That is the final form, the only form.

The Court: The only form?

Mr. Lund: That's right.

The Court: That is dated the 29th of September, 1943. [71]

The Witness: Yes, sir.

The Court: And these schedules which your accountant or bookkeeper introduced as Exhibits 21 and 22 show that the gift of bonds from your wife to each of the children was dated September 28th. That is the day before.

The Witness: I guess the lawyer did it that way.

The Court: Well, I mean, the gift was made the day before the trust?

The Witness: The gift was set away a long time.

The Court: Was set away?

The Witness: For practical reasons the gift was set away a long time. I mean, the legal papers do not show.

The Court: Now, where is that amount—I can't tell, and I am not a bookkeeper—when was that money that you gave to the children turned back to yourself into the business? You said you gave it

(Testimony of Jack Edward Smith.)

to them as a gift, and then took it back in exchange for giving them an interest in the business.

The Witness: As the contracts were completed.

The Court: When was that taken out of these separate accounts and turned over to you, to the Boston Shoe Company, in payment for the interests you gave by this deed of trust?

The Witness: Practically at the time. We were in the lawyer's office, and the things were made. These things were started a long time before.

The Court: All right. Show me on the books of your [72] company when this \$60,000.00 was taken out of the accounts of the children and put back in the Boston Shoe Company, so that you could draw against it, not as trustee, but as the managing partner. Show me that.

The Witness: I guess our books will reflect that. I am not an accountant.

The Court: Well, it does not reflect it there. That statement does not show that it was ever taken out, that \$30,000.00, if I read it correctly. Let the bookkeeper show me where it shows that this money was taken out and paid into the partnership for the 15 per cent interest. I would like to see it either here or on the books of the company.

The Witness: It is there, your Honor.

The Court: Just a minute.

Mr. Hartman: Do you want me to answer that, your Honor?

The Court: Yes.

(Testimony of Jack Edward Smith.)

Mr. Hartman: On that schedule under "Notes Receivable,"——

Mr. Lund: Page 2.

Mr. Hartman: ——on page 2 of the Barbara Ann Smith Trust is shown "9/28/43, Gift from J & R Smith, \$30,000.00."

The next entry is "10/1/43, To Boston Shoe Co.," and a credit or withdrawal from the investments of the trust is this \$30,000.00, and the balance, which is your last column, as of 12/31/48, there is no balance from that.

The Court: Will you show it to me here? Show it to me, [73] please. I don't know the bookkeeping setup.

Mr. Lund: He is referring here to notes receivable, September 28, 1943. This is the gift of the \$30,000.00 note, and then the partnership was formed on October 1, 1943, and it says, "To Boston Shoe Co., \$30,000.00."

The Court: In other words, you washed the note out against the hypothetical \$30,000.00?

Mr. Lund: The note was used to purchase the 15 per cent interest in the partnership, yes, in the Boston Shoe Company.

The Court: I see. So that this \$30,000.00——

Mr. Hartman: You see, your Honor, this first page is the schedule showing the receipts and disbursements into and out of that trust fund.

The Court: Yes, I know, and it shows the receipt of \$32,250.00.

Mr. Hartman: \$32,250.00 into that trust fund.

(Testimony of Jack Edward Smith.)

The Court: That is right.

Mr. Hartman: You see, and it does not show there whether it was in the form of a note, or bond, or whatever it was, and it is just like any item shown there.

The Court: I see.

Mr. Hartman: And this is just a schedule of the investments. As an example, let me show you and point out——

The Court: I am trying to see, as to this \$30,-000.00, in what form it got into the company. As it is here, it was [74] merely by cancellation.

Mr. Hartman: There is a note receivable received by the trust on 9-28-43 in the amount of \$30,-000.00. Then it was given to the Boston Shoe Company on October 1, 1943, the \$30,000.00, so that cancelled out that investment, that item of investment.

The Court: I see. All right. Go ahead now, Mr. Hochman.

Cross Examination

Q. (By Mr. Hochman): Mr. Smith, would it be a fair statement, sir, to say that you are the Boston Shoe Company?

A. I don't quite understand you, sir.

Q. Well, let me go back: Would it be a fair statement to say that due to your experience in the line of business in which you are operating, to your know-how, to your contacts, your industry and your skill, that you would be what we would term the guiding hand of the Boston Shoe Company?

(Testimony of Jack Edward Smith.)

A. Yes, I am there all right, if that is what you want to bring out. I imagine they could operate without me.

Q. I just want to know what is there. In other words, you are——

A. I am the head man—I am one of the head men of the Boston Shoe Company. It is running with Mr. Hartman and running with other people without me. I was sick this year, [75] and it was pretty good without me, too.

Q. Do you make major policy decisions, sir?

A. When the others fail—when all the employees fail, they come to me. Maybe about one per cent. I beef about a lot of them later.

Q. Do you maintain general supervisory control of the Boston Shoe Company?

A. What I supervise actually is the buying, the original purchase. After that it is done by employees, sir.

The Court: You have never consulted the children in regard to the matter, or your son since he has become mature, in regard to the conduct of the business, have you?

The Witness: Well, he comes into the business, your Honor, and we talk things over.

The Court: I know he works when he is not studying. Evidently he is a very studious young man.

The Witness: Yes, I have talked to him. I have talked to him about policy. Ever since he was 13

(Testimony of Jack Edward Smith.)

or 14 years old he has made recommendations. He is quite a brilliant kid.

The Court: I have no doubt about it. I have no doubt about it.

Q. (By Mr. Hochman): Mr. Smith, you mentioned that on December 31, 1942, through four notes executed by you at that time in favor of your wife, you bought her interest in the business. You also testified, sir, that those notes were at [76] 10 per cent, and you were being fair in terms of your wife. Well, sir, was it your intent at that time to execute 10 per cent notes with the thought in mind that she would turn around to the bank and sell them at 10 per cent?

A. My thought at that time was to take Mrs. Smith out of the business, to take her share out of the business, and the rest of it was all consultations. She had some advice too in that time.

Q. We have had certain discussions, sir——

A. I don't get you.

Q. We have had certain discussions in your testimony and that of your wife relative to the purchase of real estate.

A. Yes, sir.

Q. When I questioned Mrs. Smith, she mentioned the fact that your credit—and I don't doubt this—was good, and she could take the notes to the bank and get the money.

A. That's right.

Q. But what your initial testimony was that the 10 per cent granted on the notes, which was a considerable amount of money, was because it was your

(Testimony of Jack Edward Smith.)

wife's. Now, then, sir, I question you as to whether when you executed those notes was it your contemplation on December 31, 1942, that in the near future, for the purpose of getting cash to buy realty, your wife was going to sell the notes?

A. Not sell them; borrow on them. She could borrow on [77] that. She could put them up as collateral.

Q. Could she have borrowed on a six per cent note?

A. She could have borrowed perhaps on five.

Q. Do you know, sir, a Ben Breiman?

The Court: Wherein would that be material? As a matter of fact, if the bank lent her money on your note, the bank was merely banking on your credit, and the bank probably would have lent her money if you had endorsed the note with her, regardless of these notes to her, wouldn't they?

The Witness: Yes, but here she had something separate. She had something that was positively her own, your Honor.

The Court: But it wasn't secured by anything. You could sell your business the next day, and go broke, and she could not have any recourse on the community property, because she had transferred it to you, if it was a valid transfer. Under the law, you could not dispose of the business, and nobody would buy your business without your wife's signature, but with this contract, you could go out on the open market and sell the Boston Shoe Company, and she would not even have to be consulted.

(Testimony of Jack Edward Smith.)

The Witness: Yes, but I couldn't sell it before her getting paid, under the laws of California, with filing escrows, et cetera.

Q. (By Mr. Hochman): But those notes, Mr. Smith, were not payable, were they, for a year, or two, or three? In [78] other words, if you turned around on January 1, 1943, and sold the Boston Shoe Company, you would not owe your wife on the first \$30,000.00 note anything until December 31st of 1943?

A. Well, there was no such intentions. I mean, you are working up——

Q. We are not trying to.

The Court: Just a minute. That is all right. He has answered. What he is referring to——

The Witness: The bank could have lent us \$150,000.00 on six months, and we could have sold the business the next day, and the bank would have to wait six months before they would get the money. But, I mean, that isn't the way credit—we don't grant credit on that basis.

The Court: You see, what he is referring to here: On this contract the notes were——

The Witness: I needed money at that time.

The Court: What is the expression?

Mr. Hochman: Times notes, your Honor.

The Court: ——time notes.

The Witness: The time was why she got such a large interest.

The Court: I see. They were time notes, and

(Testimony of Jack Edward Smith.)

none became due earlier than one year, and the others every year thereafter. [79]

The Witness: Your Honor, if they weren't time notes, I could maybe have gotten the money at the Union Bank for four per cent, and that was the consideration.

The Court: I see. All right.

Q. (By Mr. Hochman): Mr. Smith, do you know Ben Breiman?

A. Ben Breiman is my brother, full-fledged brother, from the same father and the same mother.

Q. Now, you are trustee, are you not, of the Barbara Ann Smith trust? A. That's right.

Q. Do you recall a loan made, sir, on 11-6-47 to Mr. Breiman for \$2,500.00 from the Barbara Ann Smith trust? A. I perhaps recall that,—

Q. Now, then, sir,—

A. —with interest.

Q. No.

A. Yes, sir, with interest, and there was good intentions in that, too. It was perhaps to buy a piece of property for the Barbara Ann and Howard Smith trusts. It was to buy a piece of property, and we let him do the negotiations. It was to buy the piece of property that Rose and I own now. It was property bought, and we were going to buy it for the kids, and we didn't think it was a good investment.

Q. In other words, you gave him \$2,500.00? [80]

A. \$5,000.00, I believe.

Q. Yes, \$2,500.00 from each trust?

(Testimony of Jack Edward Smith.)

A. That's right.

Q. And he was to purchase a piece of real estate?

A. Yes, sir.

Q. Then why did he pay interest on the money, sir?

A. Well,—

Q. Was he your agent for the purpose of purchasing real estate?

A. Well, I was busy, and I wanted Ben to act as the buyer. We had certain intentions, see, and then after he made the sale, to turn the property over perhaps to the trust. That was the intention, but it turned out that I took it over rather than the trust. And there was a reason for that, too, so I took it over.

Q. And then \$20.28 was paid on that as interest?

A. That's right. The reason I took it over, you see, was a legitimate reason.

Q. Nothing—

A. It was a perfectly good reason.

Q. The Government does not intend at any time to impinge on your reputation or character. Please bear that in mind.

A. Thank you, sir.

Q. We are only dealing— [81]

A. If my sister would not have moved into the property, the property would have been the property of the trust. But since my sister moved in, counsel advised, "No, that you can't do that, that somebody may say you are buying the property so your sister could live in it, with trust money." So we wiped the deal out quick.

(Testimony of Jack Edward Smith.)

The Court: In other words, he actually invested in it?

The Witness: Yes. The property is still there, your Honor, on mine and my wife's name, I believe, and one of my relatives live in it, and that's why my counsel advised that deal is not suitable for trusts.

The Court: I see. You are not responsible to anybody because you did not create a guardianship for the children, under which you would have to account every year to the court, and the court would pass——

The Witness: But we can't——

The Court: Just a moment. (Continuing) ——and the court could pass on your acts, and determine whether you used the money wisely or not. So why were you worried about somebody taking money out of the trust for one purpose or another?

The Witness: For exactly the reason that there may come up something like that, that some day it might come up, and you might say, "Now, Jack, you are not running that trust legitimately." We didn't know anything about it.

The Court: They have no right under this trust, the way [82] you have drawn it.

The Witness: No, your Honor,——

The Court: Supposing tomorrow you take all this money and put it in a venture, and lose it the day after. Under this trust you have no responsibility.

The Witness: Your Honor, I went to the best——

(Testimony of Jack Edward Smith.)

The Court: No court could make you put it back, because you are not responsible to anybody.

The Witness: Your Honor, I went to the best counsel I knew.

The Court: That isn't the point. I am trying to find out.

The Witness: You must take the reasons. I am a layman, and you are a very brilliant lawyer.

The Court: No, we have to look back at your own method of thinking. Why should you be afraid of being tripped up by somebody when there were no limitations.

The Witness: We never thought——

The Court: Your son couldn't bring you into court under that trust, and make you account for anything, because your answer would be, "Everything that is there I gave him, and we made the trusts, and we are not accountable to anybody."

The Witness: Well, we didn't feel that way, your Honor.

The Court: I am talking legally.

The Witness: We didn't feel that way. Well, I didn't know the legal point. [83]

The Court: That is right. If you wanted to do it——

The Witness: I thought we were legally bound to be very careful.

The Court: If you wanted to do it, you could have done as they did in the Schlobohn case,—wasn't that it?

Mr. Hochman: Yes.

(Testimony of Jack Edward Smith.)

The Court: They went to the state court and had the court appoint them trustees, and they accounted every year to the court.

The Witness: We didn't think that was necessary, your Honor.

The Court: I see. All right.

The Witness: And it was run pretty well without it.

The Court: Your intentions are strictly honorable so far as your children are concerned, and nobody is disputing that. Mr. Hochman does not dispute it.

The Witness: That is what every taxman says.

The Court: Some of us wish we could exercise similar generosity to our own. Unfortunately, you cannot do it on a judge's salary.

Mr. Hochman: It was the Schlobohn case, your Honor.

The Court: That is why your son might be wiser if he got into the shoe business. I thought I would just introduce a little lightness into this litigation. We are getting too serious. [84]

The Witness: That's right.

The Court: Don't misjudge any of us. Mr. Hochman said nobody is doubting your integrity. This is just a legal proposition.

The Witness: I understand that, sir.

The Court: We have to inquire into the circumstances because the law says there are certain earmarks by which you can determine whether a trust is good or not. You heard me say this morning that

(Testimony of Jack Edward Smith.)

I have had them on both sides, and some I have ruled are good, and some bad, and it all depends on the same principles. Each case has to be judged by the particular facts, and if we are probing into these things, it is merely because it is our duty to do it, you see, in order to find out whether this arrangement is of a character that the law recognizes as valid or not. It does not go to motive at all. It goes more to intent.

The Witness: By the same token, your Honor, we didn't do anything that we didn't ask for advice on that it was absolutely right.

The Court: Certainly.

Q. (By Mr. Hochman): Mr. Smith, is it correct that as of the end of 1948 the schedules that we have before us, Plaintiffs' Exhibits 20 and 21, reflect that the Barbara trust and the Howard trust do not own any real property; is that correct, sir? [85]

A. They don't own any real property, no.

Q. Now, I believe, Mr. Smith, you stated that the motive you had for the formation of these trusts was to protect your children, and give them security.

A. That's right.

Q. You mentioned, too, sir, that you had discussed the matter of a will with your attorney, and I ask you, sir, whether or not you knew that you could by way of will leave your property to your children? Did you know you could do it by will?

A. Yes, I know. I had a will drawn, but we wanted to take and to set something up prior to the

(Testimony of Jack Edward Smith.)

will, prior to I die, to give something when I am alive.

Q. Now, then, the money in terms of the three certificates of indebtedness, the United States bonds, if you will, and the notes of your wife that were returned to the business,—the securities, therefore, of the children were back in the business?

A. The business was good, sir; good security.

Q. Well, let's look at it this way: Before the trust the children, in terms of any substantial inheritance, and I don't want to be morbid, but we must face these things, would depend upon the welfare of the Boston Shoe Company; is that correct?

A. I didn't get your question. Make it simpler.

Q. Before you had the trust arrangements,—

A. Yes.

Q. Before you had that, you owned the Boston Shoe Company, and your children had very little.

A. That's right.

Q. They were very young, and had very little.

A. That's right.

Q. Now, then, after the windfall that they would get upon your death at some date, we trust very long in the future, would depend on how well the Boston Shoe Company was doing; is that correct, sir?

A. Right today?

Q. Well,— A. Or on that date?

Q. Perhaps my question is confusing. Let's go at it this way, if we may: Forget for the moment that any trust arrangement was made. Forget for

(Testimony of Jack Edward Smith.)

the moment that they are partners. Let's assume that you owned the business, and none of this had been entered into. Now, then, whatever security in the future your children were to get upon, say, your death in terms of inheritance would depend, would it not, on how well the Boston Shoe Company had been doing, and was doing at this projected time in the future; is that correct?

A. No, it is not absolutely correct, sir.

The Court: I don't think you get the point. [87]

Mr. Hochman: No, your Honor.

The Witness: I am, your Honor, because it would depend on how much Mrs. Smith wanted to give the children.

The Court: That is not the point. The point is this: If you wanted to give them security, you see, why not give them something aside from the business, something that supposing you went broke, they would still have had it. If the Boston Shoe Company went broke, they would have nothing.

The Witness: That was our clear intentions, but about that time we started to make the arrangements, and until Mr. Gittelson finished it, it took over a year and a half.

The Court: I see. And it was determined that this was the best thing, this tie-in?

The Witness: That was the advice of Mr. Lippman, Mr. Arnold of the Union Bank, Mr. Cameron, Mr. J. B. Lewis, and if Mr. Lippman was still alive, and Mr. Siegel will perhaps remember that, we consulted with these people, and they all talked

(Testimony of Jack Edward Smith.)

that I am in the shoe business, and I know the shoe business, and Mr. Finkle perhaps, and everybody felt that would be the best security for our children. Our business has been a business with a profit record in every year since we started. There has never been a year without a profit, and a fair profit.

The Court: But it is true that your creditors could not touch this trust. I assume they couldn't. I don't know. [88] The creditors could not touch the trust, but you yourself could.

The Witness: The creditors could touch the trust because the trust was a part of the investment in the business. They could touch the Boston Shoe Company.

The Court: They could not touch the money in the children's account.

The Witness: I don't quite understand you.

The Court: A creditor of the Boston Shoe Company?

The Witness: A creditor of the Boston Shoe Company can get—he could get at it. In my opinion, he could, because it is an investment in the Boston Shoe Company. My opinion is that he could.

Mr. Lund: It is not a limited partnership, your Honor.

The Court: How is that?

Mr. Lund: It is not a limited partnership.

The Court: That is right. I was thinking in terms of a limited partnership. Yes, the private estate could be used.

(Testimony of Jack Edward Smith.)

Now, that makes the question Mr. Hochman asked even more pertinent, because if, as you understand, this trust was not protected even against creditors, and it was not protected against what you might want to do with it by drawing it out, if you chose to draw it out, what advantage was there for the children in tying it to your business rather than putting it [89] into something so that if something should happen to your business they would still have something, which you say was your intention.

The Witness: Your Honor, we went around looking for several investments, and outside of government bonds at that time, which were paying a high interest, there was nothing else to do, as far as I was concerned, to do with the money.

To give you an idea, we looked at a certain piece of property, and they asked \$40,000.00 for it at the beginning of 1942, and at the beginning of 1943 they asked \$75,000.00. That was right next door from where I am, and it finally was sold for \$110,000.00. It is quite a story, and every time I went to the agent he asked \$20,000.00 more.

The Court: It seems to me that that would have been an inducement if that happened to the price. Of course, we know what has happened. We have tried many condemnation cases.

The Witness: We quarreled every time we talked about the deal. Finally we got sick and tired of it. Every time we talked to him, it was \$20,000.00 more.

The Court: Maybe you should have bought it,

(Testimony of Jack Edward Smith.)

and sold it and taken your profit, and put it into government bonds.

The Witness: Well, we didn't do it. I mean, it is past judgment, it is hind judgment.

The Court: All right, Mr. Hochman.

Mr. Hochman: Thank you, sir. [90]

The Court: I have tried to get an answer to that question, and I think we have got it in an indirect fashion.

Mr. Hochman: Thank you, your Honor.

Q. (By Mr. Hochman): Mr. Smith, I believe your testimony a short time ago was that regarding the business you needed the money back in the business; is that correct? Is that what you said, sir?

A. Yes, I felt that by having the money in the business I would have a larger and stronger company. You must know that at that time the majority of the dealings, the transactions, were made on cash. The manufacturers sold the guy that gave him the money.

Q. I appreciate that.

A. You may find some places where they gave people money in advance.

The Court: But you didn't get any money. All you got was canceled notes.

The Witness: Your Honor, we did.

Mr. Hochman: No, your Honor. May it please the court: Returned were these three United States certificates of indebtedness, and those surely, I think the court will acknowledge, could be transferred into cash quite readily.

(Testimony of Jack Edward Smith.)

The Court: Oh, I see.

Mr. Hochman: So as to one of the trusts, it is quite true we may term it cash returned. [91]

The Witness: Your Honor, it made a terrific difference in our credit standing. So long as we took the \$100,000.00 notes from Mrs. Smith back in the business, and showed them as a liability, it made a terrific difference in our rating and our credit.

The Court: On paper.

The Witness: Well, that is how business goes. It is all paper.

The Court: I noticed on the back of them she didn't cancel the notes. She merely endorsed them over to you.

The Witness: Your Honor, we send out thousands of cases of shoes per week, and all we get is T.A.'s and paper. You don't see much cash. That's how business is done.

Q. (By Mr. Hochman): However, the \$30,000.00, the three \$10,000.00 United States certificates of indebtedness, those were what you had given, is it not right, to one of the trusts on September 29th, and they returned it October 1st to the business.

A. Officially as of September 29th, but it was planned quite a long time ago. It was set away quite a while ago.

Q. But in terms of your legal rights, you did not relinquish them until September 29th, and you got them back for the purpose of the business on October 1st.

A. Legally, of course, you can say that, that is

(Testimony of Jack Edward Smith.)

right. If Mr. Gittelson wanted to date them back, he could perhaps [92] have dated them back, but the money was set up a long time before that.

Mr. Hochman: So in this respect, may it please the court, I might perhaps not have advised the court of the proper facts on the \$30,000.00 of these bonds. They left Mr. Smith's hands on the 29th of September, 1943, by way of becoming the corpus of one of the trusts, and returned to the business of the Boston Shoe Company on October 1st.

The Court: That is right.

Mr. Hochman: So it had left it for a period of three days.

The Court: All right.

Q. (By Mr. Hochman): But it is true that what was given to the Boston Shoe Company or to yourself for the 15 per cent interest of the other trust was one of your own notes that you had previously given your wife.

A. That's right. It reduced that liability.

Q. I think it would be fair, Mr. Smith, would it not, to say there was no fresh capital added by the children?

A. I don't know what you talk about by "fresh."

The Court: Outside money. Let's call it outside money.

The Witness: Your Honor, this is not disputable. I mean, you understand all of these things. We wanted to give something to our own kids, and had we bought——

Q. (By Mr. Hochman): Mr. Smith, it is an ad-

(Testimony of Jack Edward Smith.)

mirable [93] situation, but we are dealing here with rather unemotional facts.

A. Had we gone out and bought real estate, you fellows probably wouldn't be here, and I would never have seen a "T" man in '46. You wouldn't have made out—we had all good intentions, and because we invested into something a little more lucrative, you know, you are all complaining about it.

Mr. Hochman: No, sir. It has to do with coming back to you.

The Witness: Everything,—we never touched—

Mr. Lund: Mr. Smith, wait until you are asked questions.

The Court: Well, it is argumentative.

The Witness: Yes.

Mr. Lund: That is right.

The Witness: I don't mean to argue, your Honor.

The Court: There is nothing personal in any of these inquiries by Mr. Hochman.

The Witness: I know there aren't.

The Court: It is merely a desire to get the basic facts in this transaction.

Mr. Lund: I might remind the witness that his counsel will make the proper argument at the proper time.

The Witness: Well, your Honor, you know you are human up to a certain extent.

Q. (By Mr. Hochman): Mr. Smith, does the Boston Shoe [94] Company manufacture any shoes?

A. No, not now.

(Testimony of Jack Edward Smith.)

Q. It is, then, what we may term perhaps a brokerage? A. It is a wholesale firm.

Q. Do you buy from a manufacturer and sell to the retailer?

A. That's right. Not brokerage. It is wholesalers. We are dealers. We buy and sell.

Q. How many people during the period of 1942 to 1948, inclusive, and perhaps as far back as 1935,—about how many people were working for you?

A. At any one time?

Q. Yes.

A. I think between 20 and 25 at one time. I don't remember right out. I can check that.

Q. Well, approximately.

The Court: Were they all located in the plant, or did you have people on the road?

The Witness: We had people on the road. We travel about five or six.

The Court: And they call on the trade?

The Witness: Yes.

The Court: Like the Hoffman Hardware Company, for instance? They used to be your neighbors there on your street. [95]

The Witness: Yes. Like Los Angeles Street people do. We all do the same thing.

The Court: The Hoffman Hardware Company has moved away from there now, but they have people who go out and call on people in the hardware trade, and all this firm does is fill orders.

The Witness: No, we buy the shoes.

The Court: That is right.

(Testimony of Jack Edward Smith.)

The Witness: We buy and sell them, and put our name on them.

The Court: And sell them to customers?

The Witness: Sell them to customers.

The Court: And some of them come direct, and some are solicited by your salesmen.

The Witness: By our salesmen, that is right, sir.

Q. (By Mr. Hochman): You mentioned earlier, Mr. Smith, that on occasions you would make seven or eight trips back to the east. Would that be for the purpose of purchasing merchandise?

A. Yes, sir.

Q. And were you the one who took the trips back east usually?

A. Mr. Weishaupt used to go with me before he was a partner. I think he went a couple of times himself. I don't remember exactly, but Mr. Weishaupt would go with me, and [96] sometimes we had a buyer in the market.

Q. Now, isn't it true, Mr. Smith, according to your partnership agreement and according to your own operation and understanding of it, that no major decision regarding the Boston Shoe Company could be made without your consent? Is that a fair statement, sir?

Mr. Lund: We object to that. We think the document must speak for itself, your Honor.

The Court: I think, regardless of documents, the operation in practice is important, and that can only be determined by what was actually done. I think the question is pertinent.

(Testimony of Jack Edward Smith.)

The Witness: Your Honor, what does he call a major decision?

The Court: Well, any decision on account of or on the conduct of the business.

Mr. Hochman: Important.

The Court: You never took a vote with your wife or children to decide by a majority vote what you were going to do?

The Witness: Oh, with my wife, yes, I would discuss certain things.

The Court: You would discuss it with her?

The Witness: Yes.

The Court: But with the children? [97]

The Witness: With the children, no.

The Court: So whatever you and your wife decided had to bind the children?

The Witness: That's right, yes.

The Court: Because there was no third independent person representing them. You represented them, too, because you were the trustee.

The Witness: That's right, yes; with the exception of the employees that might make a major decision.

The Court: But you employed them?

The Witness: We hired them, yes.

The Court: So they were not consulted.

The Witness: No.

The Court: Or anybody representing them?

The Witness: Oh, well, sometimes——

The Court: That is what he means.

The Witness: Oh, sometimes they were con-

(Testimony of Jack Edward Smith.)

sulted. Howard has been consulted about a lot of things.

The Court: Well, a wise man always consults trusted employees, you know. Otherwise, if you don't learn to delegate some of your duties, you cannot be a success in any business.

The Witness: That is right.

The Court: You have to learn to delegate some of your duties. [98]

The Witness: That's right.

The Court: You yourself say that the business ran itself pretty well when you were sick?

The Witness: That's right, yes.

The Court: That shows you have it organized well.

Mr. Hochman: I have no further questions, your Honor.

The Court: All right.

Mr. Lund: Just a few very brief ones.

Redirect Examination

Q. (By Mr. Lund): Mr. Smith, the Ben Breiman that has been referred to, is that the same as Ben Breiman Smith? A. Yes, sir, the same.

Q. The same individual? A. Yes, sir.

Q. From the time that these two trusts were set up in 1943, and for the years thereafter, Mr. Gittelson advised you in connection with the affairs of the trusts?

A. That's right; Mr. Gittelson, and Mr. Finkle, and sometimes some others.

(Testimony of Jack Edward Smith.)

Q. Did you understand from Mr. Gittelsohn that you and Mrs. Smith, as trustees were responsible and accountable to the children for your conduct in the handling of the affairs of those trusts?

A. That's right. [99]

Mr. Hochman: Your Honor, I object. That is quite a leading question.

The Court: That is all right.

Mr. Hochman: I think it even gives the answer to the question.

The Court: That is all right. So long as I allowed the other one, I will have to allow this one, to be consistent. I don't think they are responsible. I don't think any court could touch the trusts.

Mr. Lund: I don't know whether the witness has answered, your Honor, but we will want to have the opportunity to try to convince your Honor to the contrary. We think you are mistaken in your interpretation of the legal effect of this trust agreement. We do want to pursue that, and we have some authorities on that.

The Court: All right.

Mr. Lund: Did we get an answer to the question?

The Witness: Yes, sir.

(The answer was read.)

Mr. Lund: That is all.

(Witness excused.)

The Court: All right. Is that all?

Mr. Lund: We rest, your Honor.

The Court: Is there anything that the Government desires to present? [100]

Mr. Hochman: No, your Honor, the Government has no witnesses.

The Court: Gentlemen, we will take a recess, and then I will hear any argument you desire to make.

Mr. Lund: Your Honor, if we may, we would like to have the opportunity, even if it is only a short period of time, to file a brief.

The Court: No, I don't require any brief in cases of this character. I want oral argument, because we all know the cases, the Tower case, the Culbertson case, and the other one, and I have written opinions myself. If I want any legal authorities after that, I will ask for it.

Mr. Lund: We do appreciate that on the family partnership points, and we don't want to burden you with that type of argument, but we are disturbed about your Honor's interpretation of the legal obligations in the trusts.

The Court: If you can show me that under the law of California anybody could invest in that trust, why, I would like to have you tell me.

Mr. Lund: We are, frankly, not prepared with authorities on it, because we did not anticipate it.

The Court: It does not make any difference because I think there is nothing to limit him in drawing it all out and spending it.

Mr. Lund: For purposes other than trust purposes? [101]

The Court: For the purpose of investing it and losing it. He is not an executor.

Mr. Lund: He is subject to the exercise of due care as a trustee, your Honor.

The Court: That is true. So are the banks. In other words, I take this, and I am making this statement so that you can argue to the contrary. This trust is so broad, it is like the bank trusts, and if he went and invested in a stock, and it went to nothing, you would have no recourse on him unless you could show that he did it to defraud the trust, and you can't do it. That is what I meant.

I meant that he could use the worst judgment in the world, and lose the money, and the children would have no recourse.

The only reason I was bringing that out is because in some of the cases, or, I think in one of the cases the father, to protect himself, had had a court appoint a trustee, and even in that case it developed that the trustee always gave his consent. That is the reason why I was asking those questions, and I will hear you on the subject. Perhaps I am reading it a little more broadly than you are.

(A short recess.)

Argument on Behalf of Plaintiffs by Mr. Diehl

The Court: All right, Mr. Lund, you are the plaintiff, so I will hear you first. [102]

Mr. Diehl: May it please the court: Diehl speaking for the plaintiff.

The Court: Mr. Diehl, all right.

Mr. Diehl: I believe it can be said that the good faith of the parties in this matter cannot be questioned. They truly intended to set up an estate for their children, and I think it can be truthfully said also that the theoretical saving of income taxes, if it can be called that in any event, was not the motive behind it; that they truly wanted to give something to their children, and the taxes would fall where they might.

If we can assume that the good faith was there, then the question, it seems to me, is only what did they do, and what was actually accomplished?

Now, there has been quite a bit of confusion, I think, over the subject of what gifts went to whom, and how it got from the parents to the trusts, and from the trusts back to the father.

The Court: The reason is there was no lapse of time.

Mr. Diehl: That is true. I think for our purposes——

The Court: It is just like a paper transaction.

Mr. Diehl: For our purposes, I would think we could treat this as a gift of an interest in the business to the children, with the result of a resulting partnership being set up. [103]

But bear in mind, before we go into that any further, that prior to the time this transaction was actually consummated, between September 29 and October 1, 1943, plans had been under consideration, and, in fact, a gift of \$4,000.00 cash to each child had been made towards the end of 1942 as the beginnings of a fund.

The parents had under consideration very definitely the possibility of acquiring real estate outside of the Boston Shoe Company for the benefit of the children.

It was only after giving due consideration to the other possible investments that the decision was finally made that the best place for the children's interest was in the Boston Shoe Company, which was up to that time operated as an individual proprietorship by the plaintiff, Mr. Smith. It was a business that he knew. It was a prosperous business, and it was one in which he was sure that the children's capital could be increased substantially over the years, and a lot faster than it could if it were invested in simple income-producing properties, or bonds, or other investments.

Therefore, the decision that was finally made was to put them in as partners.

Now, at that point it seems to me that it is unimportant whether they were giving a government bond and a note, respectively, and then turning around and trading those back for an interest in the business. At that point what it amounted to [104] was that the mother and father, respectively, made gifts of parts of their interest.

The Court: May I interrupt?

Mr. Diehl: Yes, you may.

The Court: I want to say this: I take it that the Culbertson case modifies the Tower case to the extent of holding that the providence of the fund is in itself not determinative, that is, the fact that the money put in was actually a gift to the children

would not determine the matter. In other words, as to the Culbertson case, the portion that the Government cited in its brief is one that we have used dozens of times. It says:

“The question is not whether the services or capital contributed by a partner are of sufficient importance to meet some objective standard supposedly established by the Tower case, but whether, considering all the facts—the agreement, the conduct of the parties in execution of its provisions, their statements, the testimony of disinterested persons, the relationship of the parties, their respective abilities and capital contributions, the actual control of income and the purposes for which it is used, and any other facts throwing light on their true intent—the parties in good faith and acting with a business purpose intended to join together in the present conduct of the enterprise.” [105]

So that the fact that the initial capital was a gift to the children would not in itself determine the matter. You would have to go into those other elements. In fact, in some of the other cases I have taken that statement and broken it down into six or seven elements. I have forgotten in which of the opinions that I wrote I did that. But you have to consider it. There is also one feature of this case which makes it a little different from the others, the very feature that I pointed to, with Mr. Smith wondering why I was doing it, the fact that the money was left there.

In other words, there is no shifting of income, such as sometimes appears where the parents, after

making the gifts, give themselves the right to do as they please with the income. And while, as I say, they have a perfect right to do that, the way I interpret it, there is no showing that they ever used it. In fact, they didn't even draw money for the education of the children.

So that that is an element which often is not present in other trusts of this kind, because there is some kind of a siphoning off of the income, whether for the maintenance of the children, or otherwise, you see, and that is not present here.

Mr. Diehl: Yes. And, if your Honor please, of course, you have already mentioned yourself the fact that the trusts [106] do have something in them that belong to the trusts and to the children.

The Court: That is right. Of course, there is one other matter, there is no question but what control remained solely in the husband, and the business was conducted afterwards just as it had been before, as far as seeking business advice of anyone else, and regardless of what the papers said, he made the business, he created it, it was his before marriage, and thereafter, when he took his wife in and later the children, he continued to be the managing partner to whose ability the success of the business was traceable.

As a matter of fact, Mrs. Smith herself said one of the reasons for bringing the children in was the realization that he made a success of it, and they felt he would continue to do so, and he evidently has.

Mr. Diehl: Yes. I would at that point like to

remind your Honor of the statements made by the Ninth Circuit in the Toor case that control for one's own benefit and control as a fiduciary for the benefit of someone else are two different things, and while it is true that he was the managing partner, he still had to think not only of himself, but of his fiduciary duties to the trusts, and to his other partner, Mrs. Smith.

I would also point out that after——

The Court: That was my case. [107]

Mr. Diehl: Yes, that was your case.

The Court: But in the Toor case there was a guardianship created in the state court, and he was accountable. If you read my opinion, you will find he rendered accounts.

Well, I don't know whether it was in that one, or in one of the others.

Mr. Diehl: The Toor case involved a trust which at first was not an irrevocable trust, and it was changed to an irrevocable trust a year or so after the partnership was formed.

In our case, of course, both trusts are irrevocable, and the trustee, we still insist, has responsibilities that he cannot avoid. He cannot use the trust assets as he sees fit except for the benefit of the trust itself.

Now, true, he can use his discretion, and he is not responsible if he exercises bad judgment. But that is the case in practically any trust that is set up these days. The trustee is still, though, responsible for the proper administration of that trust. And today, if the son discovered that his father had mis-

appropriated the trust funds, he could certainly bring an action against him and recover for his defalcation.

The Court: I have no doubt. I mean short of actual fraud.

Mr. Diehl: But I submit that the trusts are genuine [108] and cannot just be called mere paper trusts, and ignore them; that they are genuine estates for the benefit of the children.

As such, they do actually own an interest in the business through the partnership. They not only own the interest, but they have derived benefits from the interest, in that distributions have been made, which have been invested in government securities and have been deposited in the building savings and loan accounts, so that the trusts do have a substantial amount in them over and above the investment in the partnership, and which they would not have had without their participation in the partnership.

The Court: All right.

Mr. Diehl: I would like also to point out as at least an indication that this definitely was not a tax device, that, in the first place, the trusts were given relatively minor interests in the partnership. If the splitting of income had been the prime motive, there would have been no reason why they shouldn't have made a four-way split, or an even split, instead of giving them only 15 per cent. Also, that the services of the parents, that the father and mother rendered to the partnership, were recognized, so that they were given salary allowances, so that the distribut-

able income represented properly a return on the capital invested, so that the father and mother were not dividing with their [109] children the income attributable to their personal services, all of which is to their credit.

As a matter of the careful administration of the trust, I would point out the testimony concerning the loan, and the proposed purchase of the property by the trust, and their deciding not to go through with it for the trust when it turned out to be a family affair. In other words, they are not using the trust funds for the benefit of any member of the family.

So with that point, if the court please, on the basis of the good faith of the parties and the actual carrying out of their intentions, and actually conveying something to the trust which is real, it demonstrates that something was actually accomplished, and it should be recognized for tax purposes.

Now, one more point I should make which was brought up by the defendant's brief: There were two partnerships here, and two partnership agreements. One ran from October 1, 1943, to December 31, 1944. The other ran from January 1, 1945, to June 30, 1948. The second one included a complete stranger, one Herman Weishaupt. He joined in the partnership with all of these people and recognized all of them as partners.

Furthermore, there were definite changes in the powers of the plaintiff, Jack Smith, when the second partnership came long. [110]

There is nothing in that agreement which is un-

usual to any ordinary partnership. It is all based upon the decisions of the partners, and in that partnership Jack Smith was not a majority—did not control a majority interest in the business. He, as an individual, owned 36 per cent, and he, as the trustee, owned $13\frac{1}{2}$ per cent, which was only $49\frac{1}{2}$ per cent. Mrs. Smith and Mr. Weishaupt could overrule Mr. Smith under that partnership, so that his control was definitely restricted in that case.

It is our earnest belief that in this case judgment should be entered for the plaintiffs.

The Court: All right, Mr. Hochman.

Argument on Behalf of Defendant by Mr. Hochman

Mr. Hochman: May it please the court: The Government takes issue with plaintiffs' contention as to good faith. By this the Government does not mean that the people do not have good faith, but, rather, we are confining ourselves to the income tax law, and the law before this court. We speak, then, of the good faith of the Culbertson case, to join together with a business purpose in the present conduct of an enterprise.

While it is true under the Culbertson case, your Honor, that the source of capital is not a determining factor in and of itself, yet it is an important factor, because if it is present, and fresh capital is present, under the criteria [111] of the cases emanating from the Culbertson doctrine, the proposition of the plaintiffs could stand.

In the present case, in the case at bar, however, there is no capital originating from the children.

From the testimony and the documents it is clear that all the money, or the notes and the bonds, were derived from the Boston Shoe Company and the parents, Mr. and Mrs. Smith.

Now, then, relative to this matter of control, your Honor, the cases before this honorable court, the Schlobohn case, the Toor case—which, incidentally, had an independent guardian, an independent trustee—and many, many other cases rest on this ground of good faith. Good faith, then, is measured by the yardstick of control.

As recent as March 1954 the Tax Court overturned a situation where a father had set up an independent trustee, but that independent trustee was in his employ, and the Tax Court then pointed out that that is the same thing as the man retaining control by becoming the trustee himself. You simply have no division of control interest.

You have what you started out with: In this case Mr. Smith running the Boston Shoe Company. Under the first partnership agreement he had a tremendous amount of power. No decision could be made without him, and then, too, the amount of salaries could be controlled by Jack and Mrs. Smith.

Counsel has made the point—— [112]

The Court: Of course, that merely stems from the fact that he owned the control.

Mr. Hochman: In part true, your Honor, but it is interesting in terms of determining how much——

The Court: You know the old question they used to ask, and the answer given to the conundrum, “What is the difference between 51 per cent and

49 per cent?" And the answer is, "100 per cent." In other words, that little two per cent that gives a man control is worth 100 per cent.

Of course, the thing got so bad, however, that the court devised the equitable doctrine that in the case of corporations they would protect the stockholders, even against what the majority stockholders would do, by devising equitable principles.

So that control was derived from the fact that he and his wife owned the control of the business.

There is no question in my mind that after this partnership was entered into Mr. Smith continued to control the business just as he had before. But when these cases speak of control, they speak of control, when you are dealing with a trust, of the funds, and here, regardless of what the papers said, it is quite evidence that the income derived from the partnership was distributed to the children regularly, and remained there, and was not siphoned off in any fashion.

Mr. Hochman: Your Honor, there is a substantial question—— [113]

The Court: To that extent the case is a little different from some of the others, because in reality, through the high sense of honor—and I say that sincerely—the high sense of honor that the parents had, they felt, although, as I say, I think they could have squandered the money if they wanted to, but with the high sense of honor they had, they did not take out of the trust funds even the legitimate expenditures for the children's education, which any court would allow them to do.

Mr. Hochman: This, your Honor, is commendable, but then in the nature of this suit the Government is being sued to contribute to the trusts by the prayer for relief.

The Court: Of course, if the partnership was merely a device to avoid the surtax, the fact that an arrangement reduced one's tax incidence is not the criterion. It has always been the theory of the Government, or the theory of the courts that a man may choose any method he desires for the purpose of carrying on his business, but once he chooses it, he is bound by it. If he chooses one that reduces his taxation, the loss that might result to the Government cannot stand in the way of giving it recognition.

In the F. Hugh Herbert case, which involved collapsible corporations, I went very thoroughly into the study of that problem, because it had become the custom of Government counsel to criticize these devices, and I pointed to the [114] fact that from the very inception of the income tax legislation, which followed the adoption of the amendment in 1913, the courts had held,—and even before that, when the first wartime revenue statute was passed during the Civil War, the courts held that a person could transact business in such a manner so as to avoid tax. The case arose in a criminal case where they prosecuted a bank because they claimed they resorted to a certain method of pooling their accounts, resorted to certain business methods of pooling their accounts for the purpose of avoiding the stamp tax passed during the war.

The court reversed the conviction and held it was perfectly legitimate for them to do so.

The thing that vitiates a partnership of this character is the fact, if it be a fact, that the tax saving is the sole motivation of the arrangement, and none of these elements which the court enumerates in the Culbertson case, the portion I have quoted from your brief, is present.

So in many of these cases the Government offers nothing because it has nothing to offer.

In any one of these cases I have tried, the Schlobohn case, the Toor case, and one or two others that went up on appeal, or in all of them reliance was made upon certain facts brought out in the examination and cross examination of the parties themselves, in order to determine whether the partnership or the interest given to the children was [115] legitimate for tax purposes.

In many cases we start with the assumption that it may be perfectly legitimate under the law of the particular state, and that is a matter that we run into in taxation all the time.

I remember one of the first tax cases I tried early in my career as a judge, and which I tried in the Western District of Washington. It is known as the Wenatchee Bottling Works case. That involved the payment by the men to themselves of large salaries, and making the salaries retroactive some nine or ten months. They were arguing that it was perfectly legitimate under the law of Washington to do that, and I said that it was perfectly legitimate under the law of Washington, but the Government has a right

to question whether that is a reasonable deductible expense, and in that particular case I reached the conclusion that it was not.

So in many of these cases the Government is in the peculiar position of being allowed to question a transaction that is perfectly legal. Some of them the courts have granted, and some they haven't.

For instance, we consider that when property is held in joint tenancy, as it is in California, that on the death of the spouse all you have got to do is to bring an action to establish death, and in the past we didn't even have to do that, until the section was amended, and you will remember [116] the lawyers had that amended. In the past all you had to do was to go to the Title Company and file an affidavit of death, and they would change it.

Nevertheless, the Government does not choose to recognize it, and they consider it a taxable incident. Even before it was put into the statute, it has always been in the regulations. They merely say, "That is all right for state purposes, but I am going to hold that transaction a taxable transaction."

What I am trying to say is that you may start with legality, and still reach the conclusion that for taxation purposes the legality does not solve the problem, because if legality were the sole criterion, the Government would lose out in many of these cases, because all you would have to do would be to determine whether what the taxpayer did was legally proper under the laws of the state where he did business.

All right, go ahead. My object in making these comments and observations is to clarify my thoughts. Many lawyers who have practiced before me, and I have been a judge for 26 years now, both in the state court and here, know that I have a practice of telling you what is in my mind. The reason I prefer oral argument is that I have a saying, "I can argue with a man who is about to write a brief, but I can't argue with the brief in my chambers, and if you deliver an oral argument, I can ask questions and give you an opportunity to [117] overcome any misimpression I may have in my mind either as to the law or as to the facts."

Now, no one has a right to take a vested interest in what I say, and I am making this statement to you because you are new in the Court House, at least, so far as I remember, this is your first appearance before me in any case. You may have sat in with Frank Mahoney, or Harpole, or Mitchell, or some of the other men, but so far as I am concerned, I think it is your first appearance here, and I just wanted to tell you what the meaning of this inquiry is.

Mr. Hochman: I thank the court.

Your Honor, these cases, the Schallerer case in the Seventh Circuit, the Feldman in the Fourth Circuit, the Toor case in the Ninth Circuit, the Boyd case in the Third Circuit, all of these cases, your Honor please, concur with what you have just said here, have just finished saying, and reflect in terms of the intent required for income tax purposes and confine it just to that question.

The Court: You see, the problem the courts have, however, is an easier one from the problem we have. In the Toor case the question was whether my conclusions were correct or clearly erroneous. And I don't know of any case where the higher courts have reversed the trial judge, whether he has reached one conclusion or another. My problem is more difficult than theirs. I have got to draw the inference that they [118] say I should draw, and then after I have drawn it, all they have to say is, "If it is not clearly erroneous, I will sustain it, because that is what the rules say."

Mr. Hochman: Your Honor, in the Schlobohn case, which was not appealed from this honorable court, the Government's contention, which your Honor upheld, was that this bona fide business purpose which was necessary was negated by the control exercised by the plaintiff in that case, and that is the way the case turned, on that issue. Now, then, whether or not——

The Court: I have forgotten whether that is the one, but he had a different control. That is the case where he had a guardian appointed, and then he went before the court and had his percentage increased, and he did all sorts of things. Then he had the power to terminate it in five years, I think, and he actually terminated it. He had great powers in exercising it in a manner that does not appear in this case. I think I am correct in that.

Mr. Hochman: If we may point out to the court, what is done with the money afterwards, in any event, is not determinative of the initial question

of what criteria we adopt, and how we measure the criteria of control.

What I mean to say, your Honor, is this: What happens to the money once it goes to the trust is not of import. A man may have all the donative intent in the world, a man may [119] desire with all his heart and soul to assign part of his income forever and irrevocably to his son, and do so, but that assignment of income for tax purposes is not recognized, although the gift, as such, under state law would be complete.

And so the fact that these parents were doubly generous in terms of not taking the money from the trusts for the education and welfare of the beneficiaries of the trust does not mean that the money that went into the trust should not be taxed to them, and I think it would be to confound the issue to go beyond that first stage.

We are considering, if the court please, the money that is going into the trust as opposed to what is done with it once it is there, and to that end, your Honor, we feel the Government contends that the control issue is determinative, that the testimony and the documents reflect, in accordance with case law and the cases decided before this honorable court, that the plaintiffs have not met their burden of proof in this case in overturning the ruling of the Commissioner as to the recognition of this trust partnership relationship for income tax purposes.

Mr. Lund: May I have just a brief reply, your Honor?

The Court: Oh, yes, you are entitled to the opening and the close. You are the plaintiffs. [120]

Closing Argument on Behalf of Plaintiffs
by Mr. Lund

Mr. Lund: First I hesitate to keep differing with your Honor about the effect of this trust agreement on the right of the parties to use it for support, and so on.

The Court: Mark you, I have not had an opportunity to read them in detail, as I have told you.

Mr. Lund: You have not. I did want to point out that each of the trust agreements merely provides that the income is to be accumulated, and there is nothing to be expended from the trusts prior to the age of 25, when a certain part could be distributed to the two children.

Between the ages of 21 and 25, however, for purposes of support and education, and anything of that character, the trustee could make distributions to the children from the trusts with certain formulas limiting the amount that could be distributed between the ages of 21 and 25. But up to that age the trustees could not, without rendering themselves liable to the beneficiaries, use the trust funds for any purpose other than for accumulation, paying of expenses, and so forth, and proper investments.

I think, and I gather from your Honor's analysis, oral analysis of the cases, and so on, that we are trying to state the issues as simply as we can, and I suppose the question boils down to: Were the trusts created and the partnerships created for the

purpose of reducing the income taxes of Mr. [121] and Mrs. Smith?

I believe, your Honor, that the evidence in this case is actually very strong and very conclusive that income tax considerations had no part in the determinations to create the trusts or the partnership with the trusts as partners.

Now, counsel for the Government has referred, as properly he should, to this element of control. However, that matter is not determinative. It is one of the factors to be taken into account, and it is obviously true that Mr. Smith, with all his years of experience that he has had in the business, Mrs. Smith, if she felt otherwise, or Mr. Weishaupt, the other partner of later years, would not be very apt to try to force their judgment upon him in view of his great experience, but the fact of the matter is that from 1945 and on, beginning in January of 1945, so far as his legal control was concerned, Mr. Smith did not have it. He did not have a 51 per cent interest in the partnership. He had a $49\frac{1}{2}$ per cent interest, considering his interest and his interest as a trustee.

So whatever merit the legal control this individual may have had, whatever value of importance it has in the Government's case, from 1945 on we think it has no significance whatsoever. But even in the first two years, it is only one factor, and we do not feel it is conclusive, and we think that it is overcome by the strong preponderating evidence that [122] these trusts were created, and the trusts

purchased an interest in the partnership business for the sole purpose of building up an estate for these children.

Now, they start with a \$30,000.00 contribution. They, of course, hope that by the time the children reach maturity to have built that up to a good substantial sum.

The evidence is clear that they searched for possible investments. As we look back on it now, I think, and perhaps your Honor thinks, and Mrs. Smith testified that she thought they may have made a mistake in not picking up some of the real estate they looked at. But it is very simple, when you look back years later, to see how you made a mistake.

We moved out here in 1919, and my heart bleeds when I think of all the property we could have bought for a song, and didn't.

So when you look back, and I gather from the tenor of Mrs. Smith's testimony, she was a little sorry they did not pick up some of the real estate that they did look at.

But they did investigate those possibilities of investment for their children, and after investigating several possibilities, and discussing it with their attorneys, their advisers at the bank, and so on, they concluded, on the advice of all these people, the best thing they could do to build up an estate for their children was to put it in the business that Mr. Smith knew from years of experience, and which was [123] a profitable business, and the indications were that it would continue to build up

a substantial estate for the children. So they finally concluded that that was the best for their children, and they followed that course.

Now, all of the indications are that they did not do this for tax purposes, and, as my associate has pointed out, they provided for their own drawing accounts, they did not give the children one-fourth interest in the partnership, the trusts were created on a completely irrevocable basis, the trust assets were set aside, were handled separately, and were gradually built up in investments in bonds and savings accounts, and we feel that the evidence is very compelling, your Honor, in this case more than any of the others, that this was a legitimate business transaction, not entered into for the purpose of avoiding income taxes.

If I may, despite the—I almost hesitate to do this. Your Honor knows this field so well, but I would like to just cite a few cases, additional cases, that may have escaped your attention.

Your Honor has mentioned several of your own, and one that you haven't mentioned, and I know you have it in mind, is your Osbrink case, where your Honor did sustain the partnership. And another case by Judge Harrison, very similar to this, Flandrick vs. United States.

The Court: I have forgotten the Osbrink case. What [124] kind of business was it? I have written so many opinions it is hard for me to remember which it is. What was the Osbrink case?

Mr. Lund: That is where the minor's uncle was the trustee.

The Court: Is that the one where the husband and wife were separated, and it involved a daughter and a son? Is that the Osbrink case?

Mr. Lund: In this case the minor's uncle was the trustee. He was the active manager of the partnership in his capacity as trustee, and the partnership was sustained in that case.

I must confess, your Honor, I was afraid you would embarrass me by asking me some questions about these tax cases. I am not a tax lawyer, and I am not familiar with them, but we do have the Osbrink case as one of the partnership cases your Honor recently decided, where the trusteeship relationship with a partnership existed, as here, and, nevertheless, the partnership arrangement was recognized for income tax purposes.

The case of Judge Harrison's, Frandrick vs. United States, 99 Fed. Supp. 718, is very similar.

Then there are two cases, one a Circuit Court decision, and one a District Court decision, where you have a situation almost identical with this, with husband and wife as partners in a dual capacity as trustees for their children and in their [125] separate and individual capacities.

One of them is Miller vs. Commissioner, 203 Fed. (2d) 350. That is the Circuit Court decision. The other is Maurice vs. Scofield, Western District of Texas, 1952, Paragraph 72,248.

And your Honor is probably familiar with the two Tax Court decisions, which we think sustain our position, and which were recently affirmed by the Ninth Circuit Court, Edward D. Sulton, 18 Tax

Court 715, and Thomas H. Broadhead, 18 Tax Court 726.

Your Honor may want to, if you have an opportunity, to look at those cases.

I feel that very strongly, your Honor, the evidence supports the plaintiffs' case, and judgment should be with the plaintiffs.

Thank you very much.

The Court: What was the citation on that Miller case? 203 Fed. (2d)?

Mr. Lund: 203 Fed. (2) 350.

The Court: All right. Anything further, gentlemen?

(No response.)

The Court: The matter will stand submitted.

Mr. Lund: Thank you, your Honor.

The Court: I will get to it as soon as I have a chance to look at these exhibits.

[Endorsed]: Filed November 3, 1954.

PLAINTIFFS' EXHIBIT No. 1

[Title of District Court and Cause No. 15161.]

STIPULATION

It is hereby stipulated by and between the parties hereto through their respective counsel of record as follows:

I.

The only issue for decision by the Court is to what extent, if any, the Trusts for plaintiffs' minor

children are to be recognized as partners for Federal income tax purposes. Counsel agree that, in accordance with the Court's decision on said issue the amount, if any, of the judgment can and will be computed by them pursuant to Local Rule 7(h).

II.

All statutory and procedural steps necessary to be taken by plaintiffs prerequisite to the maintaining of this action by them have been duly taken by said plaintiffs within the time and in the manner required by law. Counsel agree to join in the preparation of findings of fact which will so show.

III.

On December 29, 1943 there was filed in the office of the County Clerk of Los Angeles County, California, and published as required by law, a Fictitious Name Certificate which stated that Jack Smith, Rose Mae Smith, Jack Smith Trustee of the Barbara Ann Smith Trust, and Rose Mae Smith Trustee of the Howard Samuel Smith Trust were and had been since October 1, 1943 conducting a wholesale shoe jobbing business under the fictitious firm name of Boston Shoe Company.

IV.

On February 16, 1945 there was filed and published as above a Fictitious Name Certificate which stated that Jack Smith, Rose Mae Smith, Jack Smith Trustee of the Barbara Ann Smith Trust, Rose Mae Smith Trustee of the Howard Samuel

Smith Trust, and Herman Weiskaupt were and had been since January 1, 1945 conducting a wholesale shoe jobbing business under the fictitious firm name of Boston Shoe Company.

Dated: This 18th day of June, 1954.

LATHAM & WATKINS,
/s/ By HENRY C. DIEHL,
Attorneys for Plaintiffs

LAUGHLIN E. WATERS,
United States Attorney
EDWARD R. McHALE,
Assistant U. S. Attorney, Chief,
Tax Division

BRUCE I. HOCHMAN,
Assistant U. S. Attorney
/s/ BRUCE I. HOCHMAN,
Attorneys for Defendants

PLAINTIFFS' EXHIBIT No. 2

AGREEMENT OF PURCHASE BY HUSBAND
OF COMMUNITY INTEREST OF WIFE
IN SPECIFIC PROPERTY

This Agreement made and entered into this 31st day of December, 1942, by and between Jack Smith, sometimes hereafter referred to as "Party of the First Part" or "Husband" and Rose Mae Smith, sometimes hereinafter referred to as "Party of the Second Part" or "Wife";

Plaintiffs' Exhibit No. 2—(Continued)

Witnesseth:

Whereas, the parties hereto are husband and wife, having been married on or about the 24th day of May, 1931; and

Whereas, Party of the First Part is doing business under the firm name and style of Boston Shoe Company, with his principal place of business at 826 South Los Angeles Street, Los Angeles, California; and

Whereas, of the capital of said business the sum of \$205,867.79 is the community property of the parties hereto, having been acquired since the marriage of the parties hereto and other than by gift, devise, bequest or descent and not the issues and profits of the separate property of Party of the First Part; and

Whereas, the Party of the First Part is desirous of purchasing the community interest of Party of the Second Part in and to said business so that the entire of said business from and after the date hereof shall be the sole and separate property of said Party of the First Part, free and clear of all right, title, interest or estate on the part of the said Party of the Second Part by reason of the marital relations heretofore, now and hereafter existing between these parties, and Party of the Second Part being desirous of receiving the reasonable value of her community interest therein, so that said value and the proceeds thereof shall be her sole and separate property, free and clear from all right, title, interest or estate on the part of the Party of the

Plaintiffs' Exhibit No. 2—(Continued)

First Part by reason of the marital relations heretofore, now and hereafter existing between the parties hereto,

Now, Therefore, It Is Hereby Agreed:

1. Party of the First Part does hereby purchase from Party of the Second Part and Party of the Second Part does hereby sell unto said Party of the First Part, all of the community right, title, interest and estate of said Party of the Second Part in and to the said business commonly known and described as "Boston Shoe Company".

2. Party of the First Part does hereby agree to pay unto Party of the Second Part for her said community interest in and to said business, the sum of \$102,933.89, said sum being a full one-half of the reasonable value of the entire of the community property interest of the parties hereto therein.

In payment thereof, Party of the First Part shall, concurrently with the execution hereof, deliver unto Party of the Second Part four negotiable promissory notes of the said Party of the First Part, the first in the principal sum of \$30,000.00 due on or before one year, the second in the principal sum of \$30,000.00 due on or before two years, the third in the principal sum of \$30,000.00 due on or before three years and the fourth in the principal sum of \$12,933.89, due on or before four years. Each note shall bear interest from the date hereof until paid, at the rate of 10% per annum.

Party of the Second Part does hereby accept said

Plaintiffs' Exhibit No. 2—(Continued)

promissory notes as payment for her said community interest in and to said business.

3. From and after the date hereof, the said business commonly described as "Boston Shoe Company", with its principal place of business as aforesaid at 826 South Los Angeles Street, Los Angeles, California, together with all of its assets shall be the sole and separate property of Party of the First Part, free and clear from any and all right, title, interest or estate on the part of Party of the Second Part by reason of the marital relations heretofore, now and hereafter existing between the parties hereto.

4. From and after the date hereof, the said sum be \$102,933.89, together with the profits and issues that shall be earned thereon, represented by said promissory notes executed concurrently herewith by said Party of the First Part unto said Party of the Second Part and said promissory notes, shall be the sole and separate property of Party of the Second Part free and clear from all right, title, interest or estate on the part of Party of the First Part by reason of the marital relations heretofore, now and hereafter existing between the parties hereto.

5. This agreement is without prejudice to the right, title, interest and estate of Party of the Second Part in and to any other community property owned by her and said Party of the First Part, it being the intention hereby to terminate the community interest of said Party of the Second Part only in and to the specific property involved, to-wit,

Plaintiffs' Exhibit No. 2—(Continued)

the said Boston Shoe Company, a fictitious firm composed of Party of the First Part and other therefrom, any other property owned by the parties hereto as the community property of the parties hereto shall, insofar as this agreement is concerned, remain and continue to be the community property of the parties hereto.

6. This agreement is executed in triplicate; each triplicate is hereby declared to be an original; said triplicates, however, shall constitute but one and the same agreement.

7. This agreement shall inure to the benefit of and be binding upon the heirs, executors, administrators, successors and assigns of the respective parties hereto.

In Witness Whereof, the parties hereto have hereunto set their hands and seals the day and year first hereinabove written.

/s/ By JACK SMITH,

Party of the First Part or Husband.

/s/ By ROSE MAE SMITH,

Party of the Second Part or Wife.

State of California,

County of Los Angeles—ss.

On this 31st day of December, 1942, before me, Gertrude Harris, a Notary Public in and for said County and State personally appeared Jack Smith and Rose Mae Smith, known to me to be the persons whose names are subscribed to the within instru-

Plaintiffs' Exhibit No. 2—(Continued)

ment, and acknowledge to me that they executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] GERTRUDE HARRIS,
Notary Public in and for said
County and State.

PLAINTIFFS' EXHIBIT No. 3

\$30,000.00

December 31st, 1942

On or before 1 year after date, without grace I promise to pay to the order of Rose Mae Smith Thirty Thousand and No/100 Dollars, For Value received, with interest from date at the rate of Ten per cent per annum until paid. Principal and interest payable in Lawful Money of the United States at Los Angeles, California, and in case suit is instituted to collect this note or any portion thereof, I promise to pay such additional sum as the Court may adjudge reasonable as Attorney's fees in said suit.

/s/ Jack Smith

Due 12/31/43

Pay to the Order of Jack Smith. Signed Rose Mae Smith.

PLAINTIFFS' EXHIBIT No. 4

\$30,000.00

December 31st, 1942

On or before 2 years after date, without grace I promise to pay to the order of Rose Mae Smith Thirty Thousand and No/100 Dollars, For Value received, with interest from date at the rate of Ten per cent per annum until paid. Principal and interest payable in Lawful Money of the United States at Los Angeles, California, and in case suit is instituted to collect this note or any portion thereof, I promise to pay such additional sum as the Court may adjudge reasonable as Attorney's fees in said suit.

Due 12/31/44.

/s/ Jack Smith

Pay to the Order of Jack Smith. Signed Rose Mae Smith.

PLAINTIFFS' EXHIBIT No. 5

\$30,000.00

December 31st, 1942

On or before 3 years after date, without grace I promise to pay to the order of Rose Mae Smith Thirty Thousand and No/100 Dollars, For Value received, with interest from date at the rate of Ten per cent per annum until paid. Principal and interest payable in Lawful Money of the United States at Los Angeles, California, and in case suit is instituted to collect this note or any portion thereof, I promise to pay such additional sum as the Court may adjudge reasonable as Attorney's fees in said suit.

Due 12/31/45.

/s/ Jack Smith

Pay to the Order of Jack Smith as Original Trustee of the Barbara Ann Smith Trust, a Voluntary Express Trust. Signed Rose Mae Smith.

Pay to the order of Jack Smith, individually, in pursuance to agreement of sale and purchase of undivided interest in property.

PLAINTIFFS' EXHIBIT No. 6

\$12,933.89

December 31st, 1942

On or before 4 years after date, without grace I promise to pay to the order of Rose Mae Smith Twelve Thousand Nine Hundred Thirty-Three and 89/100 Dollars, For Value received, with interest from date at the rate of Ten per cent per annum until paid. Principal and interest payable in Lawful Money of the United States at Los Angeles, California, and in case suit is instituted to collect this note or any portion thereof, I promise to pay such additional sum as the Court may adjudge reasonable as Attorney's fees in said suit.

Due 12/31/46.

/s/ Jack Smith

PLAINTIFFS' EXHIBIT No. 7

DECLARATION OF TRUST

Know All Men by These Presents:

That Jack Smith, hereinafter sometimes designated as "Original Trustee", hereby declares that Rose Mae Smith, hereinafter sometimes designated as "Trustor", has conveyed, transferred, assigned and set over unto the "Original Trustee", without consideration, that certain promissory note dated

Plaintiffs' Exhibit No. 7—(Continued)

the 31st day of December, 1942, in the principal sum of Thirty Thousand Dollars (\$30,000.00), to (10%) per annum, executed by Jack Smith, the "Original Trustee".

Said property, and the right, title, interest and estate therein, so conveyed and transferred to the "Original Trustee" and all other property and proceeds at any time subject to this trust, shall constitute and be designated as the "Trust Estate".

The Trustor, Rose Mae Smith, does hereby declare that the property conveyed by her unto the Original Trustee hereunder is her sole and separate property, and that Jack Smith has no right, title, interest or estate therein by reason of the marital relations existing between himself and herself. Jack Smith, by accepting this Trust, and agreeing to act as the Original Trustee hereunder, agrees that said property is the sole and separate property of the said Rose Mae Smith, and that he, the said Jack Smith, has no right, title, interest or estate therein by reason of the marital relations heretofore and now existing between himself and his said wife, Rose Mae Smith.

The Trustee has received and shall hold the Trust Estate upon the trusts, with the powers and subject to the limitations as follows, to-wit:

Article I.

(1) In the event of and upon the death, incapacity, removal, resignation or refusal to act on the part of the Original Trustee during the term, exist-

Plaintiffs' Exhibit No. 7—(Continued)

ence and duration of this Trust and prior to the complete distribution of the Trust Estate, then and in that event, Ben Breiman Smith and Ben W. Finkel shall be and are hereby designated and appointed as the Successor Trustees, in the place and stead of such Trustee. In the event that the said Ben Breiman Smith and Ben W. Finkel shall not be alive at said time, or in the event that both of the said Trustees shall die or become incapacitated or be removed or refuse to act, then and in any of said events, the Union Bank & Trust Co. of Los Angeles, shall be and is hereby designated and appointed as a Successor Trustee, in the place and stead of such Trustees.

The Successor Trustee hereby appointed shall, upon the acceptance of this Trust as hereinafter provided, become vested with all of the rights, powers, duties and liabilities herein conferred and imposed upon the Trustee.

(2) Each Successor Trustee, upon the occurrence of the event upon which he or it is to administer this Trust, shall execute, acknowledge and deliver to the then living beneficiaries hereunder a written acceptance of such appointment and thereupon such Successor Trustee, without further action, shall become fully vested with all of the duties, estates, rights, powers and authority of a Trustee hereunder.

In the event that the said Ben Breiman Smith and Ben W. Finkel, though alive, shall both fail to so execute and deliver such written acceptance

Plaintiffs' Exhibit No. 7—(Continued)

within thirty (30) days of the occurrence of the event upon which they are to administer this Trust as the Trustees hereof, then and in that event, the said Union Bank & Trust Co. of Los Angeles, as the next in order of said Successor Trustee shall, within thirty (30) days thereafter (that is, after the expiration of the thirty (30) day period within which the said Ben Breiman Smith and Ben W. Finkel should have given notice of acceptance) make and deliver its instrument of acceptance and thereupon shall act as the Trustees hereunder.

(3) Throughout this Trust, the word "Trustee", when no words of description appear, as "Original Trustee" or "Successor Trustee", shall refer to and mean whomsoever shall be acting as Trustee hereunder.

(4) Jack Smith, Ben Breiman Smith, Ben W. Finkel and the Union Bank & Trust Co. of Los Angeles shall not be required to give any bond or security for the performance of his or its duties hereunder.

In the event, however, that any other person, firm or entity becomes a Trustee hereunder, such Trustee shall give a bond, executed by a good and sufficient corporate surety, conditioned for the faithful performance of the duties of such Trustee hereunder, and for the true and faithful accounting and payment to the beneficiaries hereunder as by this Trust provided, of the Trust Estate; said bond shall be in an amount equal to one-half of the then fair market value of the Trust Estate hereunder;

Plaintiffs' Exhibit No. 7—(Continued)

the premium or cost of said bond shall be a cost of administration hereunder.

Article II.

(1) Neither Jack Smith, Ben Breiman Smith nor Ben W. Finkel, while acting as Trustees hereunder, shall be entitled to any compensation for his services hereunder as such Trustee.

(2) The Union Bank & Trust Co. of Los Angeles and/or any other national banking association qualified to transact business within the State of California who shall become a Trustee hereunder, while acting as Trustee hereunder, shall be entitled to reasonable compensation, not exceeding the following, to-wit:

(a) For the acceptance and undertaking hereof one-tenth of one per cent ($1/10$ th of 1%) of the reasonable value of the corpus of the trust estate, with a minimum fee of Twenty-five Dollars (\$25.00); and a like percentage for its acceptance of any property thereafter added thereto;

(b) For its ordinary and usual duties as Trustees hereunder, an annual compensation, payable quarterly, of six tenths of one per cent ($6/10$ ths of 1%) of the reasonable value of such part of the trust estate as shall consist of personal property, and three-fourths of one per cent ($3/4$ of 1%) per annum, payable quarterly, of the reasonable value of the remainder of the trust estate, with a minimum fee of Fifty Dollars (\$50.00) per annum.

(c) On any revocation hereof, in whole or in part, or on any withdrawal of the whole or any part

Plaintiffs' Exhibit No. 7—(Continued)

of the trust estate, one-tenth of one per cent (1/10th of 1%) of the reasonable value of the trust estate withdrawn, with- (sic) drawn, with a minimum fee of twenty-five dollars (\$25.00); on every other termination of this trust and on every distribution of principal hereunder one per cent (1%) of the reasonable value of the trust estate distributed.

(d) For any unusual or extraordinary services rendered by it as Trustee, including litigation, a reasonable additional compensation.

Article III.

The Trustees shall receive and collect the corpus and income of said Estate and hold, apply, use and distribute the same in the order and priority as follows, to-wit:

(a) To the payment of any and all income taxes and other taxes, general and special assessments, and all costs, charges, attorneys' fees, accountants' fees, expenses and liabilities, including compensation under the provisions of division (2) of the foregoing Article II of the Trustees, expended or incurred or suffered in the collection, care, holding, administration, protection or distribution of the Trust Estate, for the payment of which the Trust Estate and/or the Trustees may become chargeable, including the protection of this Trust and the defense hereof against legal attack.

(b) Only in the event that Barbara Ann Smith (sometimes hereinafter designated as "Primary Beneficiary") shall die after attaining her major-

Plaintiffs' Exhibit No. 7—(Continued)

ity, the Trustee may, in his discretion and without being in any event required so to do, and before the Trust Estate is wholly distributed;

(1) Expend any part of the whole of the Trust Estate towards the payment of the whole or any part of the last illness and burial expenses of the said Barbara Ann Smith; and/or

(2) Expend any part or the whole of the Trust Estate toward the payment of any part or the whole of any assessment of property, income, estate and/or inheritance taxes which may then be levied and unpaid against the said Barbara Ann Smith or her estate.

(c) Income:

(1) During the minority of Barbara Ann Smith, the Primary Beneficiary and, in the event of her death during the minority of Howard Samuel Smith, and unless distribution of the Trust Estate be made prior thereto as hereinafter provided, the income hereof shall be by the Trustee accumulated and become a part of and distributed as a part of the corpus thereof.

(2) No accumulation of income shall be permitted by any provision of this Declaration of Trust at any time, or to any extent, in contravention of law.

(d) Corpus:

The Trustee hereunder shall in all events distribute the Trust Estate to the following persons, in the following proportions and amounts, and in the following order, priority and times, to-wit:

(1) The entire thereof unto Barbara Ann Smith,

Plaintiffs' Exhibit No. 7—(Continued)
at the following times and in the following installments, to-wit:

a. One-fourth ($\frac{1}{4}$) thereof upon the said Barbara Ann Smith attaining the age of twenty-five (25) years.

b. One-fourth ($\frac{1}{4}$) thereof upon the said Barbara Ann Smith attaining the age of thirty (30) years.

c. The balance upon the said Barbara Ann Smith attaining the age of thirty-five (35) years.

d. The Trustee may, in his absolute, arbitrary and uncontrolled discretion, commencing with the attaining by said Primary Beneficiary of her twenty-first year, advance and pay unto said Primary Beneficiary from, but not in excess of, the next succeeding installment to which said Primary Beneficiary might thereafter be entitled, such sums and at such times as to said Trustee, in his absolute, arbitrary and uncontrolled discretion, shall appear proper, necessary or essential for the maintenance, support, medical attention, care and happiness of said Primary Beneficiary, excepting only that during the period from said Primary Beneficiary attaining his majority and until she shall attain the age of twenty-five (25) years, the Trustee shall not advance unto her in excess of the sum of Five Thousand Dollars (\$5,000.00) in any one year or ten per cent (10%) of the Trust Estate in any one year, whichever is the smaller, nor during said period in excess of the installment to which said Primary Beneficiary shall be entitled upon attaining the age of twenty-five (25) years; and during the period

Plaintiffs' Exhibit No. 7—(Continued)

from said Primary Beneficiary's twenty-fifth year until she shall have attained the age of thirty (30) years, not to exceed Ten Thousand Dollars (\$10,000.00) in any one year nor twenty per cent (20%) of the Trust Estate during any one of said years, whichever is the smaller; and not exceeding the share which said Primary Beneficiary shall be entitled to receive at the age of thirty (30) years; and during the period from said Primary Beneficiary's thirtieth year until she shall attain the age of thirty-five (35) years, not to exceed Fifteen Thousand Dollars (\$15,000.00) in any one year nor twenty per cent (20%) of the Trust Estate in any one year, whichever is the smaller.

e. In the event that said Primary Beneficiary shall die prior to the distribution to her of the entire of said Trust Estate, then and in that event the undistributed portion thereof to which said Primary Beneficiary would otherwise be entitled, shall be distributed unto the following persons and in the following order and priority, to-wit:

Firstly: In the event that said Primary Beneficiary shall leave legitimate issue surviving her, then and in that event the Trustee shall distribute unto said issue per stirpes and not per capita, in one lump sum, the remainder of the Trust Estate.

In the event, however, that the said Primary Beneficiary shall not leave surviving her any such legitimate issue, then and in that event the said provision in trust made for said issue shall lapse.

Secondly: In the event that Howard Samuel

Plaintiffs' Exhibit No. 7—(Continued)

Smith, brother of the Primary Beneficiary, be alive, then and in that event the remainder of the Trust Estate shall be distributed in one lump sum unto the then Trustees of the Howard Samuel Smith Trust, a Voluntary Express Trust, created by Jack Smith, his father, and be distributed as by the provisions thereof provided.

In the event, however, that the said Howard Samuel Smith shall not have survived the said Barbara Ann Smith, then and in that event the provision in trust made for him hereby shall lapse.

Thirdly: In the event that the said Howard Samuel Smith shall have left surviving him and alive at the time of the death of the said Barbara Ann Smith, legitimate issue, then and in that event the said remainder of the Trust Estate shall be distributed in one lump sum unto said issue per stirpes and not per capita.

In the event, however, that the said Howard Samuel Smith shall not have left surviving him and alive at said time, any such issue, then and in that event the provision in trust made for such issue hereby shall lapse.

Fourthly: In the event that the provisions in trust under the foregoing sub-paragraphs shall lapse, but if Jack Smith, father of the said Barbara Ann Smith and Howard Samuel Smith, shall be alive, then and in that event, the entire of said undistributed portion of said Trust Estate shall be distributed in one lump sum unto the said Jack Smith.

Plaintiffs' Exhibit No. 7—(Continued)

In the event, however, that the said Jack Smith shall not have survived the said Barbara Ann Smith and the said Howard Samuel Smith, then and in that event, the provision in trust made hereby for him shall lapse.

Fifthly: In the event that the provisions in trust under the foregoing sub-paragraphs Firstly, Secondly, Thirdly and Fourthly shall lapse, then and in that event the entire of said undistributed portion of said Trust Estate shall be distributed unto the then living heirs at law, under the laws of succession of the State of California, of the last to die of the said Barbara Ann Smith, the said Howard Samuel Smith and the said Jack Smith, excluding, however, the Trustor, Rose Mae Smith.

Article IV.

Any income or corpus payable by the Trustee under any provision of this instrument, shall not be pledged, assigned, transferred, sold, or in any manner whatsoever accelerated, anticipated, mortgaged, encumbered or hypothecated by the beneficiaries, nor shall any income or corpus be in any manner subject or liable in the hands of the Trustees for the debts, contracts, obligations, liabilities or engagements of any beneficiary, or be subject to any assignment, voluntary or involuntary, or any other voluntary or involuntary alienation or disposition whatsoever.

Should any beneficiary attempt in any manner to anticipate, dispose of, encumber or charge his or

Plaintiffs' Exhibit No. 7—(Continued)

her interests, whether income or corpus, or any part thereof, or in the event of the bankruptcy or the rendition of any judgment or decree against the interests, whether income or corpus, of such beneficiary, or the levy of any execution or writ of attachment or garnishment thereon, then such income or corpus which would otherwise be paid over directly to such beneficiary, in the discretion of the Trustees, shall be applied directly for his or her support or maintenance, or the support or maintenance of his or her family (excluding any separated or divorced spouse), or both, or be allowed, in the sole discretion of the Trustees, to accumulate in the hands of the Trustee, to be invested and controlled and to be distributed to the next beneficiary in order hereunder; provided, however, that any such accumulations or any part thereof, may be applied from time to time by the Trustees, as the Trustees may deem proper or desirable, in like manner as if the same were a part of the current income derived from the trust fund. It is the intention hereof, among other things, that the interests, whether income or corpus, of the beneficiaries, shall not under any circumstances be liable to or available for the payment of allowance of alimony or settlement in favor of a separated or divorced spouse.

If any provision of this Article shall be deemed illegal, unlawful or void, the same shall not in any wise affect or impair any other provision of this Article or any other provision of this Declaration of Trust.

Plaintiffs' Exhibit No. 7—(Continued)

Article V.

(1) To carry out the provisions of this Trust, and in aid of and incidental to its execution, its management and administration, the Trustee shall be and is vested with the following additional powers and discretions:

(a) Under no circumstances may the Trust Estate or any part or portion thereof be used for the performance, directly or indirectly, of any legal obligation on the part of the Trustor.

(b) The powers, right and discretions herein-after in this Article V provided, are upon the express limitation hereinbefore in subdivision (a) of this division (1) of this Article V provided.

(c) The Trustees are vested with title to the trust estate as the absolute owners thereof. As such owners, said Trustees may invest said Trust Estate in any property, whether real, personal or mixed and whether legal for investment of trust funds or not and said Trustees shall not be restricted in investments of the Trust Estate to investments legal for trust funds. Said Trustees may by way of specification and not by way of limitation invest the trust estate or any part thereof in any business or may become a partner in any business or stockholder of any corporation or a member of any other form of business entity. In the event that said Trustees shall become a partner in any business, said Trustee shall have the right and power to join with the remaining partners of said business in conveying the entire thereof unto a corporation to

Plaintiffs' Exhibit No. 7—(Continued)

be formed under the laws of the State of California and to receive in exchange for such partnership interest, a like proportionate interest in the stock that shall be issued by such corporation for the entire of the partnership assets, including the interest of the Trustees.

(d) The Trustees are hereby expressly authorized to take, hold, operate and continue to hold and operate, as a part of the Trust Estate hereunder, and without liability for depreciation, loss, or otherwise, any and all property, including any business belonging to the Trust Estate, although not of a character authorized by trust investments.

(e) The Trustees hereunder are hereby authorized to incur and pay for any services, whether legal, accounting or otherwise, deemed necessary in the performance of this Trust, and such expense shall be payable in the order and priority as hereinafter provided.

(f) Said Trustees are hereby expressly authorized and invested with power to hold all shares of stock and other securities belonging to this Trust at any time in the name of any nominee; to vote any shares of stock in person or by proxy; to assert or waive any stockholder's right or privilege in respect thereto, including any right or privilege to subscribe for or otherwise acquire any additional stock; to assent to any merger, consolidation or reorganization of any property, corporation, or enterprise in which the Trustees may be interested, by virtue of this Trust, or whose obligations or se-

Plaintiffs' Exhibit No. 7—(Continued)

curities may be held hereunder, for such other securities as may be issued pursuant to such action or arrangement; to unite with other owners of similar properties or securities in any plan, agreement, deposit or trust designed to effectuate any such purpose, and to pay all assessments or expenses incidental thereto; to assent to any lease, or other corporate act.

(g) To join or unite with any other stockholder, or stockholders, or any party beneficially or otherwise interested in any shares of stock of any corporation in which this Trust may be a stockholder, for the purpose of securing the more efficient management of such corporation, and to that end may also enter into any voting trust or lawful agreement to concentrate or unify the control of any stock of any such corporation embodying such terms and provisions as may appear acceptable to the Trustees, and to deposit the shares or interest held by them hereunder under any trust or agreement, all as the Trustees may in their own judgment deem prudent.

(h) To reimburse themselves from the income and/or the corpus of the Trust Estate, for any loss, liability or expenses incurred by reason of the ownership or holding of any property received or held in this Trust and/or by reason of their use or operation of any thereof, unless caused by the Trustees' personal (not imputed) gross negligence.

(i) To borrow money and, in such manner and in accordance with such procedure, and through such

Plaintiffs' Exhibit No. 7—(Continued)

means or agency as said Trustees may deem advisable; to mortgage, pledge, transfer in trust, or otherwise encumber and/or render liable the whole or any part of the Trust Estate for the repayment of any monies so borrowed and/or as security therefor.

(j) To determine, in their discretion, what is principal of the Trust Estate, gross income or net distributable income therefrom, except that all bonuses, royalties and recoveries from mines, gas or oil leases or wells, all stock dividends and proceeds of sale of stock rights and all cash dividends (other than liquidating dividends stated in writing to be such by the corporation paying the same or proved to the satisfaction of the Trustees to be such prior to their disbursement thereof,) shall go to income, and all gain or loss which shall result from payment, retirement or sale of stocks, notes, bonds or other securities or on foreclosure or other realization upon mortgages and trust deeds, shall inure to and fall upon principal of the Trust Estate. The net income from real property acquired by the Trustees on, or by acceptance of conveyance in lieu of, foreclosure shall go to income of the Trust Estate. Brokers' or other commissions and expenses on purchase or sale of trust property shall be charged against principal. The Trustees are directed to charge all premiums on investments against principal, and to credit all discounts on investments to principal. The Trustees shall not amortize from income premiums paid from principal.

Plaintiffs' Exhibit No. 7—(Continued)

(k) To hold property of the Trust Estate in their own name or in the name of their nominee or nominees, with or without disclosure of fiduciary relationship, the Trustees being responsible for the acts of any such nominee affecting such property.

(1) To manage, control, sell, convey, exchange, partition, divide, subdivide, improve or repair any or all property of the Trust Estate; in connection with any disposal of property, to grant options and to sell upon deferred payments.

(m) The Trustees may maintain and administer the Trust Estate undivided and as a unit and shall not be required to make physical division or segregation thereof except if, when and to the extent required to make distribution therefrom as in this Trust provided, and the Trustees, in performing and fulfilling any of the provisions hereof, may pay any sum or make any distribution in kind.

(n) To allot, partition and distribute the Trust Estate at such valuations and according to such method of procedure as the Trustees may determine upon whenever such act shall be required or advisable, and to do so in kind or partly in kind and partly in money, according to its valuation thereof; upon termination of this Trust and in aid of and incidental to distribution hereunder, forthwith to sell such property as in the Trustees' discretion may be necessary in order to make or equalize distributions.

(o) Nothing herein contained shall be deemed to compel the Trustees to sell any of the assets or

Plaintiffs' Exhibit No. 7—(Continued)

properties of the Trust received at the time of the creation hereof or hereafter from the Trustor, nor prevent or restrict the Trustees from investing any or all of the Trust Estate in any business, nor from becoming a partner in any business or stockholder of any corporation or member of any other form of business entity in which Trustor is interested, as a partner, stockholder or otherwise.

(p) The Trustees may construe this Trust, and any provision thereof, and may act upon such construction without liability, except for bad faith in construing this Trust, or any provision hereof, or her wilful misconduct.

(q) The Trustees may pay out of principal or income, as they may elect, or partially out of each in such shares as they may determine, property and other taxes, assessments, charges, expenses and attorneys' fees incurred in the administration or protection of this Trust, and the Trustees' compensation as herein fixed. The discretion of the Trustees to pay said items from income or principal may be exercised not only in the interest of the Trust Estate, but for the benefit of any beneficiary.

(r) All discretions conferred upon the Trustees by this instrument shall, unless specifically limited, be absolute and uncontrolled, and their exercise conclusive on all persons interested in this Trust or the Trust Estate. The enumeration hereof of certain powers of the Trustees is not intended to limit their general powers.

(2) Income accrued or undistributed at the term-

Plaintiffs' Exhibit No. 7—(Continued)

ination of any interest or estate hereunder shall belong and go to the beneficiary or beneficiaries entitled to the next eventual interest in the proportions in which they take such interest.

(3) Unless the Trustees shall receive from some person interested in this Trust, satisfactory written proof of any death, birth, marriage or other event upon which the right to income or principal of the Trust Estate may depend, the Trustees shall not be liable to any person for disbursements made in good faith to persons whose interests shall have been affected by such event.

Article VI.

The Trustee shall under no circumstances be liable in his individual capacity upon or by reason of contracts entered into, or other obligations, whether express, implied, or imposed by law, assumed or undertaken in executing her powers, of performing his duties hereunder, but the rights thereunder of parties to such contracts, or other obligations shall be limited to such, if any, as they may have against such Trustee in his capacity as such.

Article VII.

In all matters, if there be two Trustees acting hereunder, the Trustees shall consult with each other and no Trustee or Trustees shall incur any obligation binding upon this Trust, or dispose of or hypothecate any property of this Trust, or purchase any property for this Trust without notice

Plaintiffs' Exhibit No. 7—(Continued)

to the remaining Trustee or Trustees of their intention so to do. No single Trustee, unless there be but one Trustee acting hereunder, shall have or has any authority to make any representations whatsoever binding upon this Trust, or to dispose of or hypothecate any property of this Trust, or purchase any property for this Trust, if there be more than one Trustee acting hereunder.

Article VIII.

The whole title, legal and equitable, to the Trust Estate is vested in the Trustees, as such title is necessary for the due execution of the Trust. The beneficiaries shall take no interest or estate therein, the interest of the beneficiaries hereunder being personal property only, consisting of the right to enforce the due performance of this Trust.

Article IX.

The duration of this Trust shall in no event, nor by any possibility, extend beyond, but shall wholly cease, at the death of the last survivor of the following persons now in being, to-wit: Jack Smith, Rose Mae Smith, Howard Samuel Smith and Barbara Ann Smith.

Article X.

(1) The Trustor, Rose Mae Smith, declares that she has been fully advised by Alfred Gitelson, an attorney at law, as to the legal effect of the execution of this Declaration of Trust, in so far as the transfer and assignment by her unto the Original Trustee of said Trust Estate is concerned; that she

Plaintiffs' Exhibit No. 7—(Continued)

is aware of the amount of property hereunto transferred and conveyed by her; that she has given due consideration to the question whether the trust created by this Declaration of Trust, in so far as said property transferred by her is concerned, shall be revocable or irrevocable, and she does now declare that this Trust shall be irrevocable.

Article XI.

The Trustor, with the written consent of the Trustees, but not otherwise, may add to the Trust other property which, upon the acceptance thereof by the Trustees, shall become a part of the Trust Estate to be held in trust under all of the terms hereof.

Article XII.

Throughout this Trust, the singular shall include the plural; the masculine shall include the feminine and neuter gender; the word "Trustee" shall include a corporation, as well as a natural person; the word "month" means a calendar month; the word "incapacity", as used with reference to any trustee, shall be construed to mean any person, whether insane or not, who, by reason of old age, disease, weakness of mind, or other cause, is unable, unassisted, properly to manage and take care of the Trust Estate and by reason thereof is likely to be deceived or imposed upon by artful or designing persons; the phrase "legitimate issue" shall be deemed to include any child adopted through a court proceeding for adoption, as is provided by the provisions of Section 221 to 229, inclusive (ex-

Plaintiffs' Exhibit No. 7—(Continued)

pressly excluding Section 230) of the Civil Code of the State of California.

Article XIII.

In the event that any part or portion, paragraph, clause or sentence of this Declaration of Trust shall be hereafter, by a Court of competent jurisdiction, and by a final judgment thereof, declared to be invalid, unlawful, void or unenforceable, such declaration and such invalidity or unenforceability shall not affect the remaining part of this Trust, it being hereby declared that this Trust would have been entered into and the Trustor would have entered into the remaining portions of this Trust, notwithstanding such invalidity or unenforceability, and this Trust shall continue to be effective and binding during the remaining period of the term hereof, notwithstanding the invalidity or unenforceability of any such part, portion, paragraph, clause, phrase or sentence thereof.

Article XIV.

This Declaration of Trust shall inure to the benefit of and be binding upon the heirs, executors, administrators, successors and assigns of the parties hereto.

This Declaration of Trust is executed in triplicate and each triplicate hereby is declared to be an original; the triplicate together, however, shall constitute but one and the same Trust.

In Witness Whereof, the Original Trustee and

Plaintiffs' Exhibit No. 7—(Continued)

the Trustor have hereunto set their hands and seals this 29th day of September, 1943.

/s/ By JACK SMITH,
Original Trustee.

/s/ By ROSE MAE SMITH,
Trustor.

PLAINTIFFS' EXHIBIT No. 8

DECLARATION OF TRUST

Know All Men By These Presents:

That Rose Mae Smith, hereinafter sometimes designated as "Original Trustee", hereby declares that Jack Smith, hereinafter sometimes designated as "Trustor", has conveyed, transferred, assigned and set over unto the "Original Trustee", without consideration, those certain United States Certificates of Indebtedness, Series B 1944, each dated April 15, 1943, serial numbered 70564, 70565 and 70566, and each in the principal sum of Ten Thousand Dollars (\$10,000.00).

[Exhibit 8 is identical with Exhibit 7 except that where the name Rose Mae Smith appears in Exhibit No. 7, Jack Smith appears in Exhibit No. 8, and where the name Jack Smith appears in Exhibit No. 7 Rose Mae Smith appears in Exhibit No. 8. Where the name Barbara Ann Smith appears in Exhibit No. 7 the name Howard Samuel Smith appears in Exhibit

No. 8 and where the name Howard Samuel Smith appears in Exhibit No. 7 the name Barbara Ann Smith appears in Exhibit No. 8.]

PLAINTIFFS' EXHIBIT No. 9

ASSIGNMENT AND TRANSFER BY TRUST-
OR TO TRUSTEE UNDER VOLUNTARY
EXPRESS TRUST

Know All Men By These Presents:

Whereas, I, the undersigned, Jack Smith, have this date caused to be executed a "Declaration of Trust", whereof Rose Mae Smith is the Original Trustee and Howard Samuel Smith is the Primary Beneficiary and being desirous of making a gift unto said trust,

Now, Therefore, I, Jack Smith do hereby give, assign, transfer and set over unto Rose Mae Smith as Original Trustee of the Howard Samuel Smith Trust, those certain bonds, Series B, of the Government of the United States, which said bonds and the serial numbers are each more particularly described as follows, to-wit:

United States Certificate of Indebtedness,
Series B

1944—Issued April 15th, 1943.

Serial Nos. 70564, 70565 and 70566, each in the principal sum of \$10,000.00.

Dated this 29th day of September, 1943.

/s/ By Jack Smith, Trustor

Receipt is hereby acknowledged of the bonds above described.

Dated this 29th day of September, 1943.

Rose Mae Smith as original Trustee
of the Howard Samuel Smith
Trust, a Voluntary Express Trust
By Rose Mae Smith

PLAINTIFFS' EXHIBIT No. 10

ASSIGNMENT BY TRUSTOR TO TRUSTEE
OF VOLUNTARY EXPRESS TRUST

Know All Men By These Presents:

Whereas, the undersigned, Rose Mae Smith has this date as Trustor, caused a Declaration of Trust to be executed, whereof Jack Smith is Original Trustee, and Barbara Ann Smith is Beneficiary and is desirous of making a gift unto said trust,

Now, Therefore, I Rose Mae Smith, do hereby give, assign, transfer and set over unto the said Jack Smith as Original Trustee of the Barbara Ann Smith Trust, a Voluntary Express Trust, that certain promissory note dated on or about the 31st day of December, 1942, in the principal sum of Thirty Thousand and No/100 (\$30,000.00) Dollars, due on or before three years from the date thereof, bearing interest at the rate of ten (10%) per cent

per annum, pursuant whereof, I have endorsed said note unto said Trustee, on the reverse side thereof;

“Pay to the order of the Original Trustee of the Barbara Ann Smith Trust, a Voluntary Express Trust.”

Dated this 28th day of September, 1943.

/s/ By Rose Mae Smith, Trustor

Receipt is hereby acknowledged of the bonds above described.

Dated this 29th day of September, 1943.

Jack Smith as Original Trustee of
the Barbara Ann Smith Trust, a
Voluntary Express Trust

By Jack Smith

PLAINTIFFS' EXHIBIT No. 11

AGREEMENT OF SALE AND PURCHASE OF INTEREST IN SPECIFIC PROPERTY

This Agreement made and entered into this 29th day of September, 1943, by and between Jack Smith, sometimes hereinafter referred to as “Party of the First Part” or “Seller” and Rose Mae Smith, sometimes hereinafter referred to as “Party of the Second Part” or “Purchaser”,

Witnesseth:

Whereas, Party of the First Part is the owner as his sole and separate property of and transacting business under the firm name of “Boston Shoe

Plaintiffs' Exhibit No. 11—(Continued)

Company", with its principal place of business at 826 South Los Angeles Street, Los Angeles, California; and

Whereas, said Party of the First Part is indebted unto said Party of the Second Part upon, among others, two certain promissory notes, each in the principal sum of Thirty Thousand and No/100 (\$30,000.00) Dollars, each dated the 31st day of December, 1942, each bearing interest at the rate of ten (10%) per cent per annum, one due on or before one year from the said 31st day of December, 1942 and the other due on or before two years from the said 31st day of December, 1942, which said promissory notes are the sole and separate property of said Party of the Second Part; and

Whereas, the said Party of the Second Part is desirous of purchasing an interest in and to the said business of Party of the First Part; and

Whereas, it is the opinion of Party of the First Part that his net capital in and the reasonable value of said business as of the close of business on the 30th day of September, 1943, will be the sum of Two Hundred Thousand and No/100 (\$200,000.00) Dollars and that under any circumstances, the net worth and reasonable value of said business as of the said close of business on the 30th day of September, 1943, shall be adjusted to the sum of Two Hundred Thousand and No/100 (\$200,000.00) Dollars, the parties hereto agreeing that there is no goodwill of said business; and

Whereas, Party of the First Part is desirous of

Plaintiffs' Exhibit No. 11—(Continued)

selling unto said Party of the Second Part an undivided interest in and to said business and its assets, including the net capital thereof, as of the close of business on the said 30th day of September, 1943, and the parties hereto agreeing that a thirty (30%) per cent interest therein is of a reasonable value of not to exceed Sixty Thousand (\$60,000.00) Dollars,

Now, Therefore, It Is Hereby Agreed:

I.

For and in consideration of the sum of Sixty Thousand (\$60,000.00) Dollars in hand paid by Party of the Second Part unto Party of the First Part, receipt of which is hereby acknowledged, said sum being paid by the surrender by Party of the Second Part unto Party of the First Part of those two certain promissory notes hereinabove more particularly described, each executed by Party of the First Part, the accrued interest thereon to be paid in cash by Party of the First Part unto Party of the Second Part, Party of the First Part does hereby grant, bargain and sell unto Party of the Second Part a full thirty (30%) per cent in and to said business commonly known as the "Boston Shoe Company" and in and to its assets of every type, nature, kind and description whatsoever, subject to the liabilities to which said assets are subject, as of the close of business on the 30th day of September, 1943.

Plaintiffs' Exhibit No. 11—(Continued)

II.

Party of the First Part does hereby warrant unto Party of the Second Part that his net capital and the reasonable value of said business as of the close of business on the said 30th day of September, 1943, will be the sum of Two Hundred Thousand and No/100 (\$200,000.00) Dollars.

The phrase "net capital" as used throughout this agreement, is hereby defined to mean the reasonable market value of the tangible assets of the said Boston Shoe Company, after deducting all liabilities to which said assets and business are subject, without provision for goodwill, the parties hereto hereby agreeing that the said business, Boston Shoe Company, has no goodwill. In the event that the net capital of said Party of the First Part upon the close of business on the said 30th day of September, 1943, shall be less than the said sum of Two Hundred Thousand and No/100 (\$200,000.00) Dollars, Party of the First Part shall contribute unto such business such additional cash or other assets which, when added to the assets of said business, shall create a net capital of Two Hundred Thousand (\$200,000.00) Dollars; in the event that the net capital of Party of the First Part, upon the close of business on said September 30th, 1943, shall exceed said sum of Two Hundred Thousand and No/100 (\$200,000.00) Dollars, the excess of the said net capital shall be deemed a loan from Party of the First Part unto said business, repayable unto him upon demand, without, however, any interest.

Plaintiffs' Exhibit No. 11—(Continued)

An audit shall be made of the affairs of said business as of the close of business on September 30th, 1943, by Meyer Pritkin & Company, Certified Public Accountants and Accountants for said business. By said audit, the net capital of Party of the First Part shall be determined. Said audit, insofar as it shall determine the net capital of said Party of the First Part on the close of business on said September 30th, 1943, shall be binding and conclusive upon both of the parties hereto.

III.

The interest of Party of the First Part in and to said business, being his sole and separate property, shall continue to be his sole and separate property, free and clear of any and all right, title, interest and estate on the part of Party of the Second Part by reason of the marital relations heretofore, now and hereafter existing between the parties hereto.

IV.

The purchase price paid by Party of the Second Part for said interest in and to said business being her sole and separate property, her interest in and to said business acquired hereby shall continue to be her sole and separate property, free and clear from all right, title, interest and estate on the part of the Party of the First Part by reason of the marital relations heretofore, now and hereafter existing between the parties hereto.

Plaintiffs' Exhibit No. 11—(Continued)

V.

This Agreement is executed in triplicate; each triplicate is hereby declared to be an original; said triplicates, however, shall constitute but one and the same agreement.

This Agreement shall insure to the benefit of and be binding upon the heirs, executors, administrators, successors and assigns of each of the parties hereto.

In Witness Whereof, each of the parties have hereunto set their hands and seals the day and year first hereinabove written.

/s/ By JACK SMITH,

Party of the First Part or Seller

/s/ By ROSE MAE SMITH,

Party of the Second Part or
Purchaser

State of California,
County of Los Angeles—ss.

On this 29th day of September, 1943, before me, Gertrude Harris, a Notary Public in and for said County and State, personally appeared Jack Smith, known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same.

In Witness Whereof, I have hereunto set my

Plaintiffs' Exhibit No. 11—(Continued)

hand and affixed my official seal the day and year in this certificate first above written.

[Seal] /s/ GERTRUDE HARRIS,
Notary Public in and for said
County and State

State of California,
County of Los Angeles—ss.

On this 29th day of September, 1943, before me, Gertrude Harris, a Notary Public in and for said County and State, personally appeared Rose Mae Smith, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that she executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] /s/ GERTRUDE HARRIS,
Notary Public in and for said
County and State

PLAINTIFFS' EXHIBIT No. 12

AGREEMENT OF SALE AND PURCHASE OF
UNDIVIDED INTEREST IN PROPERTY

This Agreement made and entered into this 30th day of September, 1943, by and between Jack Smith, sometimes hereinafter referred to as "Party

Plaintiffs' Exhibit No. 12—(Continued)

of the First Part" or "Seller" and Rose Mae Smith, sometimes hereinafter referred to as "Party of the Second Part", Rose Mae Smith as Original Trustee of the Howard Samuel Smith Trust, a Voluntary Express Trust, sometimes hereinafter referred to as "Party of the Third Part" or "Purchaser" and Jack Smith as Original Trustee of the Barbara Ann Smith Trust, a Voluntary Express Trust, sometimes hereinafter referred to as "Party of the Fourth Part" or "Purchaser",

Witnesseth:

Whereas, Party of the First Part is the owner of an undivided seventy (70%) and Party of the Second Part is the owner of an undivided thirty (30%) per cent in and to that certain business commonly known and described as "Boston Shoe Company", with its principal place of business at 826 South Los Angeles Street, City and County of Los Angeles, State of California; and

Whereas, Rose Mae Smith is the Original Trustee of the Howard Samuel Smith Trust, a Voluntary Express Trust and Jack Smith is the Original Trustee of the Barbara Ann Smith Trust, a Voluntary Express Trust; and

Whereas, Party of the First Part and Party of the Second Part do hereby represent and warrant unto Party of the Third Part and Party of the Fourth Part that the net capital of said business as of the close of business on September 30th, 1943 and the reasonable value of said business will be the

Plaintiffs' Exhibit No. 12—(Continued)

sum of Two Hundred Thousand (\$200,000.00) Dollars; and

Whereas, Party of the First Part is desirous of selling unto Party of the Third Part and unto Party of the Fourth Part each, an undivided fifteen (15%) per cent in and to said business as of the close of business on the 30th day of September, 1943, the purchase price of said interest to be based upon the net capital of said business on said date, all of the parties hereto hereby agreeing that said business has no goodwill and Party of the Second Part being agreeable thereto,

Now, Therefore, It Is Hereby Agreed:

I.

For and in consideration of the sum of Thirty Thousand (\$30,000.00) Dollars in hand paid, receipt of which is hereby acknowledged from Party of the Third Part, Party of the First Part does hereby grant, bargain and sell unto the said Party of the Third Part a full undivided fifteen (15%) per cent in and to that certain business commonly described as the "Boston Shoe Company" as of the close of business on the 30th day of September, 1943.

II.

For and in consideration of the sum of Thirty Thousand (\$30,000.00) Dollars in hand paid, receipt of which is hereby acknowledged from Party of the Fourth Part, Party of the First Part does hereby grant, bargain and sell unto the said Party of the

Plaintiffs' Exhibit No. 12—(Continued)

Fourth Part a full undivided fifteen (15%) per cent in and to that certain business commonly described as the "Boston Shoe Company" as of the close of business on the 30th day of September, 1943.

III.

The phrase "net capital" as herein used is hereby defined to mean the reasonable market value of all the tangible assets of said business commonly known as the "Boston Shoe Company" after providing for the payment of all liabilities to which said assets and said business are subject, all as of the close of business on the 30th day of September, 1943. An audit shall be made of the said business as of the said close of business on September 30th, 1943, by Meyer Pritkin & Company, Certified Public Accountants and Accountants for said business. By said audit, the net capital of said business shall be determined as at said time. In the event that the net capital of said business as at said time is less than the sum of Two Hundred Thousand (\$200,000.00) Dollars, Party of the First Part shall pay into said business such sum as shall be necessary to make the net capital thereof said sum. In the event that the net capital of said business as at said time is in excess of said sum, the excess thereof shall be deemed a loan by Party of the First Part unto said business, to be paid to him upon demand, without interest. Any audit made by the said Meyer Pritkin & Company and the determination thereby of the net capital of said business as at the close of

Plaintiffs' Exhibit No. 12—(Continued)

business at said time, to-wit, the 30th day of September, 1943, shall be conclusive upon all of the parties hereto. In any such audit, no value shall be placed upon the name of said business or the goodwill thereof, the parties hereto agreeing that said business has no goodwill.

IV.

This Agreement is executed in quadruplicate; each quadruplicate is hereby declared to be an original; said quadruplicates, however, shall constitute but one and the same agreement.

This Agreement shall inure to the benefit of and be binding upon the heirs, executors, administrators, successors and assigns of each of the parties hereto.

In Witness Whereof, each of the parties have hereunto set their hands and seals the day and year first hereinabove written.

/s/ By JACK SMITH,

Party of the First Part or Seller

/s/ By ROSE MAE SMITH,

Party of the Second Part

Rose Mae Smith as Original Trustee of the Howard Samuel Smith Trust, a Voluntary Express Trust

/s/ By ROSE MAE SMITH,

Party of the Third Part of
Purchaser

Plaintiffs' Exhibit No. 12—(Continued)

Jack Smith as Original Trustee of the Barbara Ann Smith Trust, a Voluntary Express Trust
/s/ By JACK SMITH,

Party of the Fourth Part or
Purchaser

State of California,
County of Los Angeles—ss.

On this 30th day of September, 1943, before me, Gertrude Harris, a Notary Public in and for said County and State, personally appeared Jack Smith, Rose Mae Smith, Rose Mae Smith as Original, Trustee of the Howard Samuel Smith Trust, a Voluntary Express Trust and Jack Smith as Original Trustee of the Barbara Ann Smith Trust, a Voluntary Express Trust, known to me to be the persons whose names are subscribed to the within instrument and acknowledged to me that they executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] GERTRUDE HARRIS,
Notary Public in and for said
County and State

PLAINTIFFS' EXHIBIT No. 13

ARTICLES OF CO-PARTNERSHIP

These Articles of Co-Partnership, made and entered into as of the 1st day of October, 1943, by and between Jack Smith, sometimes hereinafter referred to as "Party of the First Part" or "First Co-Partner", Rose Mae Smith, sometimes hereinafter referred to as "Party of the Second Part" or "Second Co-Partner", Jack Smith As Original Trustee of the Barbara Ann Smith Trust, a Voluntary Express Trust, in his representative capacity, sometimes hereinafter referred to as "Party of the Third Part" or "Third Co-Partner" and Rose Mae Smith As Original Trustee of the Howard Samuel Smith Trust, a Voluntary Express Trust, in her representative capacity, sometimes hereinafter referred to as "Party of the Fourth Part" or "Fourth Co-Partner";

Witnesseth:

Whereas, Party of the First Part is the owner of an undivided forty (40%) per cent and Party of the Second Part is the owner of an undivided thirty (30%) per cent and Party of the Third Part is the owner of an undivided fifteen (15%) per cent and Party of the Fourth Part is the owner of an undivided fifteen (15%) per cent as tenants in common, of that certain business commonly known and described as "Boston Shoe Company", with its principal place of business at 826 South Los Angeles Street, City and County of Los Angeles, State of California; and

Plaintiffs' Exhibit No. 13—(Continued)

Whereas, by reason of the foregoing, all of the parties hereto are desirous of constituting themselves into a co-partnership, upon the terms, conditions and covenants as herein set forth, supplementing the same as hereinafter in Article XIV provided by certain only of the provisions of the Uniform Partnership Act of the State of California.

Now, Therefore, It Is Hereby Agreed:

Article I.

The parties hereto do hereby agree that they are from this time on, for the term and upon the conditions, covenants and agreements hereof, co-partners.

Article II.

1. Said partnership shall be conducted and carried on under the partnership name and style of "Boston Shoe Company".

2. The principal place of business of this co-partnership shall be at Number 826 South Los Angeles Street, City of Los Angeles, County of Los Angeles, State of California, or at such other place as the partners hereto may from time to time designate in writing.

This partnership may have one or more offices, and in any state or territory of the United States, as may be determined and designated in writing by the partners hereto.

Plaintiffs' Exhibit No. 13—(Continued)

Article III.

1. The business of this co-partnership shall be to buy, sell, manufacture and deal in, and to engage in and conduct and carry on the business of buying selling, manufacturing and dealing in footwear and any other business related thereto and deemed to be for the best interests of the co-partnership.

2. In general, this co-partnership may carry on any business that may be carried on by, and have and exercise all powers that a natural person may regularly carry on or have under the laws of the State of California.

Article IV.

1. The capital of the co-partnership shall consist of the following, to-wit:

A. Contributed Capital:

Party of the First Part, Party of the Second Part, Party of the Third Part and Party of the Fourth Part do hereby sell, assign, transfer, set over and convey unto this co-partnership, all property of every type, nature, kind and description whatsoever, including leases and leaseholds owned by said parties, in undivided interests as tenants in common, in that certain business commonly known and described as the "Boston Shoe Company", situate at 826 South Los Angeles Street, City and County of Los Angeles, State of California, subject to the liabilities to which said assets are subject, all as shall be shown upon a "Statement of Assets and Liabilities of Boston Shoe Company as at the close of business on September 30th,

Plaintiffs' Exhibit No. 13—(Continued)

1943", prepared by Meyer Pritkin & Company, Certified Public Accountants and Accountants for said business. The net capital of said business as of the close of business on September 30th, 1943, is hereby agreed to be the sum of Two Hundred Thousand (\$200,000.00) Dollars, by reason whereof, the interest of each of the parties therein is valued at and the contribution of each of the parties to the "Contributed Capital" of this co-partnership is agreed, therefore, to be as follows, to-wit:

Jack Smith: \$80,000.00.

Rose Mae Smith: \$60,000.00.

Jack Smith, Original Trustee of the Barbara Ann Smith Trust, a Voluntary Express Trust: \$30,000.00.

Rose Mae Smith, Original Trustee of the Howard Samuel Smith Trust, a Voluntary Express Trust: \$30,000.00.

The phrase "net capital" as herein used, is hereby defined to mean the residue of the reasonable market value of the tangible assets of the said Boston Shoe Company, after deducting and making provision for the payment of all liabilities of said business, existing as of the close of business on the said 30th day of September, 1943, without, however, any provision for goodwill, the parties hereto hereby agreeing that said business has no goodwill.

B. Earned Capital:

Upon the close of the first fiscal year, or calendar year, whichever may be used by this co-partnership for its purposes, and thereafter every year, an

Plaintiffs' Exhibit No. 13—(Continued)

audit shall be made of the business of the co-partnership, and all net profits of the co-partnership earned and collected shall be thereby determined. No provision shall be made in any audit of the affairs of the co-partnership for any value of the goodwill, if any, of the co-partnership. In the event that such audit shall show a net profit earned and collected for such "accounting period", and before any distribution of net profits shall be made to any partner, there shall be first set aside to an "Earned Capital Account" such percentage of the said net profits as the partners shall from time to time determine. Said "Earned Capital Account" so created shall be used as capital of the co-partnership in the operation of the co-partnership business. The net profits remaining after setting aside said per cent to said "Earned Capital Account" are sometimes hereinafter referred to as "distributable net profits".

The said period of each audit is sometimes herein in these Articles of Co-Partnership referred to as "accounting period".

Each partner shall have an interest in the "Earned Capital Account" created by the foregoing provision in the same proportion to which each partner shall share in the losses of the co-partnership, as provided by Article VI hereof.

C. Further Capital:

If at any time or times hereafter further capital be required for carrying on the business and the partners shall determine to increase the capital, the additional capital shall be advanced by the partners

Plaintiffs' Exhibit No. 13—(Continued)

in the same proportion as they are entitled to share in the "distributable net profits".

Article V.

1. The net profits of the co-partnership shall be distributed as follows, to-wit:

A. There shall be first set aside to the "Earned Capital Account" such percentage of the net profits as is provided for by Subdivision B.—"Earned Capital"—of Article IV hereof.

B. To Jack Smith, 40% of the "distributable net profits".

C. To Rose Mae Smith, 30% of the "distributable net profits".

D. To Jack Smith As Original Trustee of the Barbara Ann Smith Trust, a Voluntary Express Trust, in his representative capacity, 15% of the "distributable net profits".

E. To Rose Mae Smith As Original Trustee of the Howard Samuel Smith Trust, a Voluntary Express Trust, in her representative capacity, 15% of the "distributable net profits".

2. There shall be paid to each of the partners hereto who shall render services unto the business of the co-partnership, a salary of such amount and payable at such times as shall be determined by the partners hereto.

Any salary received by any partner under any provision of these "Articles of Co-Partnership" shall be deemed and charged as a part of the cost of doing business of this co-partnership, and not

Plaintiffs' Exhibit No. 13—(Continued)

an advance or charge against the share of the “distributable net profits” to which such partner so receiving said salary is otherwise entitled.

3. Each partner shall be entitled to draw out of and from the “distributable net profits” and/or “Contributed Capital” and/or “Earned Capital” of the co-partnership for his own special account, such amount as the co-partners hereto may from time to time designate.

4. If any partner shall leave in the business, after any “accounting period”, any share of such partner’s “distributable net profits” (other than the percentage to be set aside to the “Earned Capital Account”) the same shall be considered a contribution to the “Contributed Capital” of such partner.

5. If any partner shall advance to the co-partnership at its request any sums, the same shall be considered a debt of such co-partner, but no interest shall be payable thereon.

Article VI.

Each of the partners hereto shall share in the losses of the co-partnership in the same proportion that each is entitled to share in the “distributable net profits”.

Article VII.

1. Each partner hereto shall devote so much of his time to the business of the co-partnership as the partners shall from time to time designate.

2. Books of account shall be kept and entries made therein of all monies, goods, checks, receipts,

Plaintiffs' Exhibit No. 13—(Continued)

payments, and all transactions of the co-partnership. Said books of account shall be kept where the business of the co-partnership is to be carried on, and shall be at all times open to the examination of the partners, or either or any of them.

3. All monies of the co-partnership shall be deposited in a bank account, and in the name of the co-partnership. All withdrawals therefrom or checks upon or drafts against said account must be signed by and need only be signed by either the Party of the First Part, or the Party of the Second Part.

4. The co-partnership business shall be managed and carried on, and all contracts, deals or transactions given or taken for any matter or thing concerning the co-partnership, shall be made, given or taken and entered into in the name of the co-partnership.

The co-partnership shall not enter into any contracts, deals, transactions, notes, or any other contract whatsoever whereby it shall be obligated to perform any duty or to render any service or to pay any sum whatsoever, or incur any obligation or liability binding upon the said co-partnership unless consented to by the Party of the First Part during his lifetime and while a partner hereof.

5. No partner shall, during the continuance of this co-partnership, carry on or be concerned or interested financially, directly or indirectly, in the same kind of business as that carried on by this co-partnership, nor be engaged in nor undertake, during the existence hereof, any other trade or business.

Plaintiffs' Exhibit No. 13—(Continued)

6. No partner hereto shall, without the written consent of the partners entitled to receive a majority of the "distributable net profits", including such partner, become surety, guarantor, endorser or otherwise liable for any other person or firm, whether corporate, sole proprietorship, partnership or otherwise.

Article VIII.

No partner shall, without the previous written consent of the remaining partners, assign or hypothecate his interest in or to this co-partnership or in or to the profits or capital to which said partner may be entitled.

Any such attempted assignment or hypothecation shall not, subject, however, to the rights and options granted to the remaining partners by the provision of Article IX hereof, dissolve the co-partnership nor as against the remaining partners entitle the assignee or the person holding said interest or profits or capital as security during the continuance of this co-partnership, to interfere with or take any part in the management of the co-partnership affairs or to receive any salary or to require any information or account of the co-partnership matters or to inspect the co-partnership books, but it shall merely entitle the said assignee or said other person to receive in accordance with his contract the profits or capital to which the assigning partner would otherwise be entitled, in accordance with, at the times and in the amounts as provided by, the covenants hereof. In the event of any such assignment

Plaintiffs' Exhibit No. 13—(Continued)

neither the partner so assigning, nor his assignee, shall be entitled to any salary; the partners not so assigning, however, shall be entitled to a reasonable salary in such amount and payable at such times as the said non-assigning partners may from time to time determine.

Article IX.

This co-partnership shall begin on the date hereof and continue for a period of twenty (20) years; provided, however:

(a) In the event that any partner shall, without the previous written consent of the remaining partners, assign or hypothecate his interest in and to this co-partnership, or in any to the profits or capital to which such partner may be entitled, the remaining partners may terminate the interest of such partner in and to the co-partnership and its assets, and are hereby granted the exclusive and irrevocable right and option to purchase the interest of the said partner in and to the co-partnership.

The term of the option, the purchase price, and the manner of payment thereof, shall be as is provided in sub-paragraph (d) of this Article IX.

In the event that the said remaining partners shall not elect to exercise the option hereby granted, the co-partnership shall continue as modified by the provisions of Article VIII hereof, to the expiration of said term.

(b) In the event that any partner hereto shall become mentally incompetent or insane, or in any other way incapable of performing his part of this

Plaintiffs' Exhibit No. 13—(Continued)

co-partnership contract, or shall voluntarily withdraw from the co-partnership, or shall become a bankrupt, or any execution upon any judgment against said partner be levied upon his interest and not released within sixty (60) days or in the event of said partner's interest in and to the co-partnership being charged with the payment of any judgment against, or other obligation of, said partner, the remaining partners hereto may terminate the interest of such partner in and to the co-partnership and its assets and the said remaining partners are hereby granted the exclusive and irrevocable right and option to purchase the interest of such partner in and to the co-partnership.

The term of the option, the purchase price and manner of payment thereof, shall be as is provided in subdivision (d) of this Article IX.

In the event said option be not exercised by said remaining partners, the co-partnership shall continue to the expiration of the original term hereof, excepting only that the said partner violating the foregoing provision shall not be entitled to receive any salary, and the remaining partners shall be entitled to a reasonable salary in such amount and payable at such times as such remaining partners shall determine.

(c) In the event of the death of any partner, the remaining partners may terminate the interest of such deceased partner in and to the co-partnership and the remaining partners are hereby granted an exclusive and irrevocable option to purchase the

Plaintiffs' Exhibit No. 13—(Continued)

interest of such deceased partner in and to the co-partnership.

The terms of the option, the purchase price, and the manner of payment thereof shall be as is provided in subdivision (c) of this Article IX.

In the event that said option shall not be exercised, the co-partnership, as between the surviving partners and the deceased co-partner, shall be deemed dissolved, though not terminated; excepting, however, that the surviving co-partners shall have the right to operate and conduct the co-partnership business and affairs until the expiration of the original term. In the event that the surviving partners shall elect to continue to operate and conduct the co-partnership business and affairs until the expiration of the original term, the interest of the deceased partner, his heirs, executors, administrators, successors and assigns, in and to the "Contributed Capital" and "Earned Capital", profits and losses, shall be reduced in the proportion that the proceeds of the life insurance which shall have been paid for by the co-partnership, as provided by Article X hereof, bears to the total of the "Contributed Capital" and "Earned Capital" of the deceased co-partner, and the interest of each of the surviving co-partners in and to said "Contributed Capital", "Earned Capital", profits and losses, shall be increased in the proportion, and each shall succeed to such proportion as the then interest of each such surviving partner in

Plaintiffs' Exhibit No. 13—(Continued)

the "distributable net profits" bears to the total interests of all of the surviving partners in and to the "distributable net profits". In such event, the surviving partners shall have the exclusive right of conducting, managing and carrying on the business of the co-partnership, and neither the heirs, executors, administrators, or other personal representative of such deceased co-partner shall have any interest whatsoever in and to the business of the co-partnership, or any voice in the management or conduct of the business or affairs of the co-partnership; the only right on the part of such heirs or executors or administrators or other personal representative of such deceased co-partner, shall be to receive the said share of the profits or capital of such deceased co-partner, as reduced, as hereinbefore provided, in accordance with and at the times and in the amounts as provided by the covenants hereof; excepting only, however, that any obligation or liability created or incurred by said surviving partners in the operation of said business shall be binding only upon the surviving partners and the interest of said deceased co-partner, his heirs, executors, administrators, successors and assigns, in and to the co-partnership, but shall not be binding upon nor create any personal obligation or liability upon such heirs, executors, administrators, successors and assigns of said deceased co-partner. In such event, neither the heirs nor executors nor other personal representative of such deceased co-partner shall be entitled to receive any salary; the surviving

Plaintiffs' Exhibit No. 13—(Continued)

partners, however, shall be entitled to receive a reasonable salary in such amount and payable at such times as said surviving partners shall from time to time determine.

(d) In the event of the occurrence of any act giving rise to the right of purchase, as provided by sub-divisions (a) and (b) hereof, and if the partner entitled to exercise said option shall desire to exercise said option, such partner shall give written notice to the partner whose interest is to be purchased, of his intention to exercise said option, said notice to be given within three (3) months after actual knowledge of the event giving rise to said right of purchase.

The purchase price shall be a sum equal to the interest of said partner, (whose interest is to be purchased), in the "Contributed Capital" and in the "Earned Capital", and any other debt owing to such co-partner on the part of the co-partnership; all as shall be shown by a certified audit to be made by the then accountants of the co-partnership, in accordance with the usual accounting practices theretofore followed by the co-partnership, as of the end of the calendar month preceding, or the commencement of the calendar month succeeding, whichever shall be the shortest period from the occurrence of the act giving rise to the right of purchase.

The said purchase price shall be payable as follows, to-wit:

(1) The purchasing partner shall, immediately

Plaintiffs' Exhibit No. 13—(Continued)

after service of said notice of intention to exercise said option, cause an escrow to be opened in the escrow department of any national trust and savings bank within the City of Los Angeles; said escrow shall be between the said purchasing partner and said partner whose interest is to be purchased.

(2) The purchasing partner shall deposit in said escrow at the time of the opening thereof, a sum equal to twenty-five (25%) per cent of said purchase price, together with a non-negotiable note of said purchasing partner, wherein the said partner whose interest is to be purchased shall be the payee, the amount of said note to be in the amount of the balance of the said purchase price; said note shall be payable in not more than six (6) semi-annual equal installments, together with interest at the rate of four (4%) per cent per annum upon the unpaid balances from time to time; said escrow may provide that the said purchase price shall only be paid over unto the said partner whose interest is to be purchased, or the person entitled thereto, when there shall be transferred unto the purchasing partner the right, title, interest and estate of the partner whose interest is to be purchased in and to the said co-partnership and its assets, free and clear of and from the event or act giving rise to the right of purchase. The purchasing partner shall in any event assume and agree to pay all liabilities of the co-partnership and to forever indemnify and save harmless the partner whose

Plaintiffs' Exhibit No. 13—(Continued)

interest is to be purchased from any loss by reason thereof.

(3) Upon the opening of said escrow and the payment therein of the said sum and the deposit therein of said note, as hereinbefore in paragraph (2) provided, the interest of the partner whose interest is being purchased thereby shall terminate and cease and the partner exercising the said rights and option shall succeed to all of the right, title, interest and estate of the said partner whose interest is thereby being purchased, in and to the said co-partnership assets, free and clear from the event or act giving rise to the right of purchase.

(e) In the event of the occurrence of death of one of the co-partners, giving rise to the right of purchase under sub-paragraph (c) of this Article, and if the surviving partners shall desire to exercise said option, said partners shall give written notice of their intention to exercise said option to the executors or administrators or surviving spouse or other personal representative of such deceased partner within six (6) months from the occurrence of the event giving rise to said right of purchase, or the appointment and qualification of the executor, administrator, or other personal representative of such deceased partner, and written notice thereof served upon the surviving partners, whichever shall last occur.

The purchase price shall be the following sum to-wit:

(1) A sum equal to the interest of such deceased

Plaintiffs' Exhibit No. 13—(Continued)

partner in and to the "Contributed Capital", and in and to the "Earned Capital", and any other debt owing to such co-partner on the part of the co-partnership; all as shall be shown by a certified audit to be made by the then accountants of the co-partnership, in accordance with the usual accounting practices theretofore followed by the co-partnership, as of the end of the calendar month preceding, or the commencement of the calendar month succeeding, whichever shall be the shortest period from, the date of death of the deceased co-partner, less the amount of the proceeds of the life insurance in force and effect payable to the beneficiaries designated by such deceased partner, which said insurance shall have been taken out and the premiums thereon paid by the co-partnership, as provided by Article X hereof. In the event that the amount of said insurance shall exceed the said purchase price, the co-partnership shall have no claim, right, title, interest or estate whatsoever in and to said excess of said insurance, but no further sum shall be payable to the estate, heirs, executors, administrators, or other personal representatives or successors of such deceased co-partner, and his interest in and to the said co-partnership, its assets and properties, shall terminate and cease and neither the said heirs or executors or administrators or other personal representatives of such deceased co-partner shall have any right, title, interest or estate whatsoever in and to the co-partnership or its assets, and in such event, each of the surviving

Plaintiffs' Exhibit No. 13—(Continued)

partners shall, ipso facto, succeed to the interest of such deceased co-partner in and to the "Contributed Capital" and "Earned Capital" and other debt owing to said co-partner, and in and to the profits and losses, in the proportion as the then interest of each such surviving partner in the "distributable net profits" bears to the total interest of all of the surviving partners in and to the "distributable net profits".

In the event that the amount of said insurance shall be less than the said purchase price as hereinbefore provided, the difference between the said purchase price and the said insurance shall be payable as follows:

a. The purchasing partner shall, immediately after service of said notice of exercise of option, cause an escrow to be opened in the escrow department of any national trust and savings bank in the City of Los Angeles; said escrow shall be between the said purchasing partner and whomsoever may be entitled to receive the said purchase price; the purchasing partner shall deposit in the said escrow at the time of opening thereof, a sum equal to twenty-five (25%) per cent of said difference, together with a negotiable note of said purchasing partner for the balance, which said note shall be payable in not more than six (6) semi-annual equal installments, together with interest at the rate of four (4%) per cent upon the unpaid balances from time to time; interest payable monthly; said note shall by its terms provide that in the event that the

Plaintiffs' Exhibit No. 13—(Continued)

maker shall default in the payment of any installment of interest or principal when due, or in the event that the maker shall, prior to the payment in full thereof, sell his interest in or withdraw from said co-partnership, or die, or in the event that said co-partnership, as between and among the surviving partners, shall be dissolved, or shall liquidate, or shall sell all or substantially all of its assets, then and in any of said events, the holder of said note may declare the entire balance immediately due and payable; and said note shall further provide by its terms that in the event of any action being brought thereon the maker agrees to pay a reasonable attorney's fee. The escrow may provide that the said purchase price shall only be payable by the said escrow holder when it shall hold for the purchasing partner a good and sufficient release and quitclaim from the person or persons entitled to receive said purchase price together with a warranty bill of sale or other document necessary to vest title in said purchasing partner of all of the interest of such deceased partner in and to the said co-partnership, its properties and assets, subject to its liabilities.

(f) In determining the purchase price under any of the foregoing provisions of this Article IX, no value shall be set upon, and no provision shall be made for, the goodwill, if any, of the co-partnership.

(g) In paying the purchase price under any of the foregoing sub-paragraphs of this Article, the purchasing partners may use any funds of the said

Plaintiffs' Exhibit No. 13—(Continued)

co-partnership to which the partner whose interest is to be purchased would otherwise be entitled.

(h) In the event that there shall be more than one partner entitled to exercise the option granted by subparagraphs (a) or (b) or (c) of this Article, each shall have the right and option to purchase such proportion of the interest of the partner whose interest is to be purchased as the interest of each of the said purchasing partners in and to the "distributable net profits" bears to the total interest of all of the said purchasing partners in and to the "distributable net profits". In the event that any partners entitled to exercise said option shall not elect so to do, the remaining partners also so entitled may exercise the option as to the entire interest of the partner whose interest is to be purchased.

(i) Neither the failure to exercise the said options granted by subparagraphs (a) or (b) or (c) of this Article, or the exercise thereof, shall cause a dissolution of this co-partnership as between or among the remaining co-partners.

(j) In the event of the exercise of the options granted by subparagraphs (a) and/or (b) and/or (c) of this Article, the purchasing partner shall in writing assume and agree to pay all obligations of the co-partnership and to forever indemnify and save harmless the partner whose interest is to be purchased, his heirs, executors, administrators, successors and assigns, from any and all loss by reason thereof.

Plaintiffs' Exhibit No. 13—(Continued)

Article X.

The co-partnership may take out and pay all premiums under policies of life insurance upon the lives of any one or more of the co-partners. The principal amount thereof shall be such as shall be determined by the partners.

Such policies shall be payable in favor of such person or persons as the partner upon whose life the policy shall be issued, shall designate.

Such policies shall, if possible, confer upon the co-partnership the right to borrow upon and against said policies the full loan value thereof whenever the partners shall deem it necessary so to do, and in such event, the partnership shall have no liability whatsoever to the partner upon whose life said policy shall issue or to the beneficiary thereunder for the repayment thereof.

Upon the death of any partner, upon whose life a policy of life insurance shall have been taken out as herein provided, the said insurance upon his life shall be paid as far as this co-partnership is concerned, to said named beneficiary. Such payment shall reduce the interest of said deceased co-partner in and to the co-partnership as hereinbefore by the provisions of subparagraphs (c) and (e) of Article IX provided.

Article XI.

1. In the event of the termination of this co-partnership, expressly subject, however, to the provisions of Article IX and particularly subparagraphs (a), (b) and (c) thereof, the liabilities of

Plaintiffs' Exhibit No. 13—(Continued)

the co-partnership as hereinafter in the following division 3 of this Article XI defined, shall be paid or amply provided for in the order and priority as thereby provided.

2. The payment of a debt or liability shall be deemed to have been adequately provided for if the payment thereof shall have been assumed or guaranteed in good faith by one or more financially responsible persons or corporations or other form of business organization, whether a partner hereto or not, and such provision was determined in good faith and with reasonable care by a majority of the then partners hereof to be adequate at the time of any distribution of the assets upon such expiration.

3. The liabilities of the co-partnership shall be paid in the following order and priority, to-wit:

(a) Those owing to creditors other than partners.

(b) Those owing to partners other than for "Contributed Capital", "Earned Capital", or "distributable net profits".

(c) Those owing to partners in respect of "Contributed Capital".

(d) Those owing to partners in respect of "Earned Capital".

(e) Those owing to partners in respect of "distributable net profits".

Article XII.

If at any time during the continuance of this co-partnership, the partners shall deem it necessary or expedient to make any amendment or addition

Plaintiffs' Exhibit No. 13—(Continued)

to or deletion in any article, clause, phrase, paragraph, sentence or word herein contained for the more advantageous or satisfactory management of the co-partnership business, such may be made by any writing executed by a majority of the then partners hereto; provided, however, that at all events, the Party of the First Part during his lifetime must be one of the partners consenting thereto, and in the event of and upon his death during the lifetime of the Party of the Second Part, then by such party, and thereupon such amendment or addition shall have the same force and effect as if the same had been originally embodied in and formed a part of these articles, or, in the event of any deletion, as if the said deletion had not been a part hereof.

Article XIII.

1. Throughout these Articles of Co-partnership, the singular shall include the plural, the plural shall include the singular, the feminine shall include the masculine and neuter gender, and the masculine shall include the feminine and neuter gender.

2. Whenever in these Articles of Co-Partnership it is provided for any act to be done or designated by the co-partners, it refers to and means the then partners entitled to receive a majority of the "distributable net profits".

3. Unless otherwise specifically provided in these Articles of Co-partnership, and subject to the provisions of Article IX hereof, and particularly sub-

Plaintiffs' Exhibit No. 13—(Continued)

paragraphs (a), (b) and (c) thereof, the partners entitled to receive a majority of the "distributable net profits" at said times shall control in all matters requiring the determination of the partners.

Provided, however, if such majority cannot agree, or in the event of an equal division of such co-partnership upon any matter, the Party of the First Part shall have the right, power and authority to make the final and conclusive decision thereon during his lifetime.

4. Any audit that shall be made as provided by any of the provisions of these Articles of Co-Partnership, including by way of specification and not by way of limitation the provisions of Articles IV, V, IX, X and XI, or any division, subdivision or paragraph thereof, shall be conclusive upon each of the partners hereto as to the interest of each partner in and to the "Contributed Capital", and in and to the "Earned Capital", and in and to the "distributable net profits", and as to any obligation owing by the co-partnership to any partner, and as to any other matter, the subject thereof.

5. Any notice by these Articles of Co-partnership authorized to be given, shall be deemed to be duly given if delivered personally to the person to whom it is authorized to be given, or sent by registered mail, postage prepaid, addressed to him at his usual or last known place of abode. Any notice to be given to the co-partnership shall be given to it in writing at its office.

Plaintiffs' Exhibit No. 13—(Continued)

Article XIV.

This co-partnership is formed under the Uniform Partnership Act as now in force in the State of California, being Title X, Division Third, Part IV of the Civil Code of the State of California, and there is incorporated herein and made a part hereof each and all of the provisions thereof; excepting, however, such portions of the provisions thereof as may be inconsistent herewith, in which event, the provisions hereof shall govern; and excepting further that there is expressly excluded herefrom, and each of the partners hereto does hereby expressly waive, the right to rely upon or to claim any rights under or by virtue of the provisions of subdivision (1) of Section 2403 of the Civil Code of the State of California, the provisions of subdivisions (e), (f) and (h) of Section 2412 of said Civil Code of the State of California, and the provisions of Section 2436 of said Civil Code of the State of California.

Article XV.

These Articles of Co-Partnership are executed in as many parts as there are partners hereto, and each of such parts is hereby declared to be an original; all, however, shall constitute but one and the same agreement.

These Articles of Co-Partnership shall be binding upon and inure to the benefit of the heirs, executors, administrators, successors and assigns of each of the parties hereto.

In Witness Whereof, the parties hereto have

Plaintiffs' Exhibit No. 13—(Continued)

hereunto set their hands and seals the day and year first above written.

/s/ By JACK SMITH,
Party of the First Part or First
Co-Partner.

/s/ By ROSE MAE SMITH,
Party of the Second Part or Second
Co-Partner.

Jack Smith As Original Trustee of the Barbara
Ann Smith Trust, a Voluntary Express Trust,
in His Representative Capacity.

/s/ By JACK SMITH,
Party of the Third Part or Third
Co-Partner.

Rose Mae Smith As Original Trustee of the Howard
Samuel Smith Trust, a Voluntary Express
Trust, in Her Representative Capacity.

/s/ By ROSE MAE SMITH,
Party of the Fourth Part or Fourth
Co-Partner.

State of California,
County of Los Angeles—ss.

On this 1st day of October, 1943, before me, the
undersigned, a Notary Public in and for said
County and State, personally appeared Jack Smith,
Rose Mae Smith, Jack Smith as Original Trustee

Plaintiffs' Exhibit No. 13—(Continued)
of the Barbara Ann Smith Trust, a Voluntary Express Trust, in his representative capacity and Rose Mae Smith as Original Trustee of the Howard Samuel Smith Trust, a Voluntary Express Trust, in her representative capacity, known to me to be the persons whose names are subscribed to the foregoing instrument, and acknowledged to me that they executed the same.

Witness my hand and official seal.

[Seal] GERTRUDE HARRIS,
Notary Public in and for said County and State.

PLAINTIFFS' EXHIBIT No. 14

SUPPLEMENT TO ARTICLES OF CO-PARTNERSHIP OF BOSTON SHOE COMPANY

This Supplement to Articles of Co-Partnership of Boston Shoe Company, made and entered into as of the first day of October, 1943, by and between Jack Smith, sometimes hereinafter referred to as "Party of the First Part" or "First Co-Partner"; Rose Mae Smith, sometimes hereinafter referred to as "Party of the Second Part" or "Second Co-Partner"; Jack Smith as Original Trustee of the Barbara Ann Smith Trust, a Voluntary Express Trust, in his representative capacity, sometimes hereinafter referred to as "Party of the Third Part" or "Third Co-Partner", and Rose Mae Smith, as Original Trustee of the Howard Samuel Smith

Plaintiffs' Exhibit No. 14—(Continued)

Trust, a Voluntary Express Trust, in her representative capacity, sometimes hereinafter referred to as "Party of the Fourth Part" or "Fourth Co-Partner";

Witnesseth:

Whereas, the parties hereto did heretofore, and as of the First day of October, 1943, enter into "Articles of Co-Partnership"; and

Whereas, it is provided by Division 2 of Article V thereof that there shall be paid to each of the partners thereto who shall render services unto the business of the co-partnership, a salary of such amount and payable at such times as shall be determined by the partners, any such salary to be charged as a part of the cost of doing business of said co-partnership and not an advance or charge against the share of the "distributable net profits" to which such partner so receiving said salary is otherwise entitled; and

Whereas, Party of the First Part and Party of the Second Part are, and will be, rendering services unto the business of said co-partnership and the parties are therefore desirous of agreeing as to the salaries to be paid unto Party of the First Part and Party of the Second Part for the remainder of the calendar year of 1943;

Now, Therefore, It Is Hereby Agreed:

I.

That there shall be paid unto Jack Smith for the remainder of the calendar year of 1943, for his

Plaintiffs' Exhibit No. 14—(Continued)

services unto the business of said co-partnership, a salary based upon the sum of Twenty-five Thousand Dollars (\$25,000.00) per calendar year; and there shall be paid unto Rose Mae Smith, for her services unto the business of said co-partnership, for the balance of the calendar year of 1943, a salary based upon the sum of Twenty-Four Hundred Dollars (\$2,400.00) per calendar year.

II.

This Supplement to Articles of Co-Partnership is executed in four parts; each part is hereby declared to be an original; all however, shall constitute but one and the same agreement.

This Supplement to Articles of Co-Partnership shall be binding upon and inure to the benefit of the heirs, executors, administrators, successors and assigns of each of the parties hereto.

In Witness Whereof the parties hereto have hereunto set their hands and seals as of the day and year first above written.

/s/ By JACK SMITH,

Party of the First Part

/s/ By ROSE MAE SMITH,

Party of the Second Part

Jack Smith as Original Trustee of the Barbara Ann Smith Trust, a Voluntary Express Trust

/s/ By JACK SMITH,

Party of the Third Part

Plaintiffs' Exhibit No. 14—(Continued)

Rose Mae Smith as Original Trustee of the Howard Samuel Smith Trust, a Voluntary Express Trust

By
Party of the Fourth Part

PLAINTIFFS' EXHIBIT No. 15

ARTICLES OF CO-PARTNERSHIP OF
BOSTON SHOE COMPANY

These Articles of Co-Partnership executed as of the 1st day of January, 1945, by and between Jack Smith, sometimes hereinafter referred to as "Party of the First Part" or "First Co-Partner", Rose Mae Smith, sometimes hereinafter referred to as "Party of the Second Part" or "Second Co-Partner", Jack Smith, As Original Trustee of the Barbara Ann Smith Trust, a Voluntary Express Trust, in his representative capacity, sometimes hereinafter referred to as "Party of the Third Part", or "Third Co-Partner", Rose Mae Smith, As Original Trustee of the Howard Samuel Smith Trust, a Voluntary Express Trust, in her representative capacity, sometimes hereinafter referred to as "Party of the Fourth Part" or "Fourth Co-Partner" and Herman Weishaupt, sometimes hereinafter referred to as "Party of the Fifth Part" or "Fifth Co-Partner";

Plaintiffs' Exhibit No. 15—(Continued)

Witnesseth:

Whereas, Party of the First Part, Party of the Second Part, Party of the Third Part and Party of the Fourth Part were heretofore and unto the close of business on the 31st day of December, 1944, co-partners doing business under the firm name and style of Boston Shoe Company, with their principal place of business at 826 South Los Angeles Street, City and County of Los Angeles, State of California, under certain "Articles of Co-Partnership" executed as of the 1st day of October, 1943; and

Whereas, Party of the Fifth Part is desirous of becoming associated with the remaining parties hereto as a co-partner for the ownership and operation of said business and the remaining parties hereto being agreeable thereto, all of the parties hereto are desirous of constituting themselves into a co-partnership upon the terms, conditions and covenants as herein set forth, supplementing these "Articles of Co-Partnership" only as hereinafter in Article XV provided by certain only of the provisions of the Uniform Partnership Act of the State of California.

Now, Therefore, It Is Hereby Agreed:

I.

The Co-Partnership heretofore existing among Party of the First Part, Party of the Second Part, Party of the Third Part and Party of the Fourth Part be and the same is hereby dissolved and terminated as of the close of business on the 31st day

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of December, 1944. The interest of each of said parties in and to the assets thereof and the obligations and liabilities on the part of said co-partnership unto each thereof, shall be more particularly set forth in a "Balance Sheet of Boston Shoe Company, a Co-Partnership, as of the close of business on December 31st, 1944" to be prepared by Meyer Pritkin & Co., Certified Public Accountants and Accountants for said co-partnership; said Balance Sheet, together with the Profit and Loss Statement for the period ending December 31st, 1944, which said Profit and Loss Statement shall likewise be prepared by Meyer Pritkin & Co., is hereby agreed to constitute the final accounting of the Co-Partnership heretofore existing among the said Party of the First Part, Party of the Second Part, Party of the Third Part and Party of the Fourth Part, and any other or further accounting is hereby waived.

Article II.

The parties hereto do hereby agree that they are, from this time on, for the term, upon the conditions, covenants and agreements hereof, co-partners.

Article III.

1. The Co-Partnership hereby created shall be conducted and carried on under the partnership name and style of "Boston Shoe Company".

The name "Boston Shoe Company" and all other trade names and trade-marks heretofore used by the Co-Partnership heretofore existing among the

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Party of the First Part, Party of the Second Part, Party of the Third Part and Party of the Fourth Part, and all other trade names and trade-marks which shall hereafter be used by this Co-Partnership, created by these Articles of Co-Partnership are and shall continue to be and those hereafter used shall become and be the property of Party of the First Part, Party of the Second Part, Party of the Third Part and Party of the Fourth Part said parties hereby licensing this Co-Partnership to use all of said trade names and trade-marks until the dissolution hereof; neither the Co-Partnership created hereby nor Party of the Fifth Part shall hereby nor hereafter acquire any right, title, interest or estate therein other than the right on the part of the Co-Partnership created hereby to use said trade-marks and trade names until the dissolution hereof, excepting only, in the event of the death of the last to die of Party of the First Part and Party of the Second Part, in which event the interest of said parties in and to said trade-marks and trade names shall be deemed an asset and property within the provisions of Article X, Division (c) thereof.

2. The principal place of business of this Co-Partnership shall be at Number 826 South Los Angeles Street, City of Los Angeles, County of Los Angeles, State of California, or at such other place as the partners hereto may from time to time designate in writing.

This partnership may have one or more offices

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and in any state or territory of the United States, as may be determined and designated in writing by the partners hereto.

Article IV.

1. The business of this Co-Partnership shall be to buy, sell, manufacture and deal in, and to engage in and conduct and carry on the business of buying, selling, manufacturing and dealing in footwear and any other business related thereto and deemed to be for the best interests of the Co-Partnership.

2. In general, this Co-Partnership may carry on any business that may be carried on by, and have and exercise all powers that a natural person may regularly carry on or have under the laws of the State of California.

Article V.

1. The capital of the Co-Partnership shall consist of the following, to-wit:

(A) Party of the First Part, Party of the Second Part, Party of the Third Part and Party of the Fourth Part do hereby sell, assign, transfer, set over and convey unto this Co-Partnership, subject to the provisions and limitations of Article III, Division 1 hereof, all property, whether real, personal or mixed and of whatsoever type, nature, kind and description, including leases and leaseholds owned by said parties in undivided interests as tenants in common in that certain Co-Partnership

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business formerly and until the close of business on the 31st day of December, 1944, existing between them, under the firm name and style of Boston Shoe Company, subject to the liabilities to which said assets are subject, all as shall be shown upon a "Statement of Assets and Liabilities of Boston Shoe Company as of the close of business on December 31st, 1944", to be prepared by Meyer Pritikin & Co. The total net capital of said business as of the close of business on said 31st day of December, 1944, as shall be shown upon said "Statement of Assets and Liabilities of Boston Shoe Company as of the close of business on December 31st, 1944", which said statement of assets and liabilities shall be conclusive and binding upon all of the parties hereto, Parties of the First Part, Second Part, Third Part and Fourth Part do guarantee will not be less than the total sum of Two Hundred Thousand (\$200,000.00) Dollars. In the event that the said total net capital of all of said Parties of the First Part, Second Part, Third Part and Fourth Part shall be less than said sum of Two Hundred Thousand (\$200,000.00) Dollars, each of said parties, to wit, Party of the First Part, Party of the Second Part, Party of the Third Part and Party of the Fourth Part shall add to the interest of each such amount as may be necessary to make the capital interest of each of said parties equal to the sum hereinafter in this paragraph set forth. In the event that the total net capital of said business shall exceed said sum of Two Hundred Thou-

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sand (\$200,000.00) Dollars, as shall be shown by said statement of assets and liabilities the interest of each of said parties therein in excess of the amounts hereinafter in this paragraph set forth shall be deemed a loan by said Party unto this Co-Partnership to be repaid at such time and to bear such rate of interest, if any, as the partners hereto shall agree. By reason of the foregoing, the interest of each of the parties of the said First Part, Second Part, Third Part and Fourth Part therein is valued at and the contribution of each to the invested capital of this Co-Partnership is, therefore, agreed to be as follows:

Jack Smith: \$80,000.00.

Rose Mae Smith: \$60,000.00.

Jack Smith, Original Trustee of the Barbara Ann Smith Trust, a Voluntary Express Trust: \$30,000.00.

Rose Mae Smith, Original Trustee of the Howard Samuel Smith Trust, a Voluntary Express Trust: \$30,000.00.

The phrase "net capital" as herein used is hereby defined to mean the residue of the book values of the assets of said Boston Shoe Company, after deducting and making provisions for the payment of all liabilities of said business as disclosed by the books and records thereof existing as of the close of business on the 31st day of December, 1944, without, however, any provisions for goodwill, the parties hereto hereby agreeing that said business had no goodwill. The amounts, if any, owing by

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this Co-Partnership unto the said Parties of the First Part, Second Part, Third Part and Fourth Part by reason of the interest of each being in excess of the agreed invested capital of each, shall be set forth in the ledgers of this Co-Partnership by the accountants hereof, Messrs. Meyer Pritkin & Co., and such entries shall be conclusive and binding upon all of the parties hereto.

(B) Party of the Fifth Part shall contribute unto the invested capital hereof the sum of Twenty-Two Thousand (\$22,000.00) Dollars.

(C) Upon the close of the first fiscal year, or calendar year, whichever may be used by this Co-Partnership for its purposes, and thereafter upon the close of each fiscal or calendar year, as the case may be, an audit shall be made of the business of the Co-Partnership, and all net profits of the Co-Partnership earned and collected shall be thereby determined. No provision shall be made in any audit of the goodwill, if any, of the Co-Partnership. In the event that such audit shall show a net profit earned and collected for such "accounting period", and before any distribution of net profits shall be made to any partner, there shall be first set aside to capital such percentage of said net profits as the partners shall from time to time determine. Said capital so created shall be used as capital of the Co-Partnership in the operation of the Co-Partnership business. The net profits remaining after setting aside said percentage to said capital are some-

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times hereinafter referred to as "distributable net profits".

The said period of each audit is sometimes herein in these Articles of Co-Partnership referred to as "accounting period".

Each partner shall have an interest in the capital created by the foregoing provision in the same proportion to which each partner shall share in the losses of the Co-Partnership, as provided in Article VII hereof.

(D) If at any time or times hereafter further capital be required for carrying on the Co-Partnership business and the partners shall determine to increase the capital, the additional capital shall be advanced by the partners in the same proportion as they are entitled to share in the "distributable net profits".

Article VI.

1. The net profits of the Co-Partnership shall be distributed as follows:

(A) There shall be first set aside to capital such percentage of the net profits as is provided for by Subdivision C of Article V hereof.

(B) To Jack Smith, thirty-six (36%) per cent of the "distributable net profits".

(C) To Rose Mae Smith, twenty-seven (27%) per cent of the "distributable net profits".

(D) To Jack Smith, As Original Trustee of the Barbara Ann Smith Trust, a Voluntary Express Trust, in his representative capacity, thirteen and

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one-half ($13\frac{1}{2}\%$) per cent of the "distributable net profits".

(E) To Rose Mae Smith, As Original Trustee of the Howard Samuel Smith Trust, a Voluntary Express Trust, in her representative capacity, thirteen and one-half ($13\frac{1}{2}\%$) per cent of the "distributable net profits".

(F) To Herman Weishaupt, ten (10%) per cent of the "distributable net profits".

2. There shall be paid to each of the partners hereto who shall render services unto the business of the Co-Partnership, a salary of such amount and payable at such times as shall be determined by the partners hereto.

Any salary received by any partner under any provision of these "Articles of Co-Partnership" shall be deemed and charged as a part of the cost of doing business of this Co-Partnership, and not an advance or charge against the share of the "distributable net profits" to which such partner so receiving said salary is otherwise entitled.

Until further agreement of the partners hereto, there shall be paid unto the following partners the following salaries, to wit:

Jack Smith, Twenty-Five Thousand (\$25,000.00) Dollars per annum;

Rose Mae Smith, Twenty-Four Hundred (\$2,400.00) Dollars per annum;

Herman Weishaupt, Six Thousand (\$6,000.00) Dollars per annum.

3. Each partner shall be entitled to draw out of

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and from the "distributable net profits" and/or Capital of the Co-Partnership for his own special account, such amount as the co-partners hereto may from time to time designate.

4. If any partner shall leave in the business, after any accounting periods, any share of such partner's "distributable net profits" other than the percentage to be set aside to the capital, and other than in pursuance of an agreement among the partners to increase proportionately, that is in the same proportion that each is liable for losses hereof, the capital, the same shall be considered a debt unto such co-partner. No interest shall be payable thereon.

5. If any partner shall advance to the Co-Partnership at its request any sums, it shall be deemed a debt owing unto such co-partner on the part of the Co-Partnership. Interest shall be payable thereon of such rate as the partners hereto may from time to time agree.

Article VII.

Each of the partners hereto shall share in the losses of the Co-Partnership in the same proportion that each is entitled to share in the "distributable net profits".

Article VIII.

1. Party of the Fifth Part shall devote his entire business time to the business of the Co-Partnership; the remaining partners hereto need only devote so much of their time unto the business of

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the Co-Partnership as the remaining co-partners shall in their absolute, arbitrary and uncontrolled discretion deem necessary or proper.

2. Books of account shall be kept and entries made therein of all monies, goods, checks, receipts, payments, and all transactions of the Co-Partnership. Said books of account shall be kept where the business of the Co-Partnership is to be carried on, and shall be at all times open to the examination of the partners, or either or any of them.

3. All monies of the Co-Partnership shall be deposited in a bank account and in the name of the Co-Partnership. All withdrawals therefrom, checks upon or drafts against said account must be and need only be signed by either Party of the First Part or any two of the remaining partners.

4. The Co-Partnership business shall be managed and carried on, and all contracts, deals or transactions given or taken for any matter or thing concerning the Co-Partnership, shall be made, given or taken and entered into in the name of the Co-Partnership.

5. Excepting only Party of the First Part, none of the remaining partners shall, during the continuance of this Co-Partnership, carry on or be concerned or interested financially, directly or indirectly, in the same kind of business as that carried on by this Co-Partnership, nor be engaged in nor undertake, during the existence hereof, any other trade or business.

6. No partner hereto shall, without the written

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consent of the partners entitled to receive a majority of the "distributable net profits", including such partner, become surety, guarantor, endorser or otherwise liable for any other person or firm, whether corporate, sole proprietorship, partnership or otherwise.

Article IX.

No partner shall, without the previous written consent of the remaining partners, assign or hypothecate his interest in or to this Co-Partnership, or in or to the profits or capital to which said partner may be entitled.

Any such attempted assignment or hypothecation shall not, subject, however, to the rights and option granted to the remaining partners by the provisions of Article X hereof, dissolve the Co-Partnership, nor as against the remaining partners entitle the assignee or the person holding said interest or profit or capital as security during the continuance of this Co-Partnership, to interfere with or take any part in the management of the Co-Partnership affairs or to receive any salary or to require any information or account of the Co-Partnership matters or to inspect the Co-Partnership books, but it shall merely entitle the said assignee or said other person to receive in accordance with his contract the profit or capital to which the assigning partner would otherwise be entitled, in accordance with, at the times and in the amounts as provided by, the covenants hereof. In the event of any such assignment, neither the partner so assigning, nor

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his assignee, shall be entitled to any salary; the partners not so assigning, however, shall be entitled to a reasonable salary in such amount and payable at such times as the said non-assigning partners may from time to time designate.

Article X.

This Co-Partnership shall begin on the 1st day of January, 1945, and continue for an original term of three (3) years and thereafter for successive and continuous minimum terms of two (2) years each. In the event that any partner shall desire to dissolve this Co-Partnership, he shall give notice of his election to dissolve this Co-Partnership at least ninety (90) days prior to the expiration of the then existing term; such notice shall only be effective upon the expiration of the then existing term. If no partner shall give such notice, this partnership shall continue for another term of two years and thereafter for successive, and continuous and minimum terms of two years each, unless and until any partner hereto shall give said notice. Provided, however;

(a) In the event that any partner shall, without the previous written consent of the remaining partners entitled, with such partner, to a majority of the net distributable profits, or assigns or hypothecates his or her interest in and to this Co-Partnership, or in and to the profits or capital to which such partner may be entitled, the remaining partners, other than Party of the Fifth Part, may

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terminate the interest of such partner in and to the Co-Partnership and its assets, and are hereby granted the exclusive and irrevocable right and option to purchase the interest of the said partner in and to the Co-Partnership.

The term of the option, the purchase price, and the manner of payment thereof, shall be as is provided in division (d) of this Article X.

In the event that the said remaining partners shall not elect to exercise the option hereby granted, the Co-Partnership shall continue as modified by the provisions of Article IX hereof, to the expiration of the then existing term.

(b)

(1) In the event that any partner hereto shall become mentally incompetent or insane or in any other way incapable of performing his part of this Co-Partnership contract, or shall voluntarily withdraw from the Co-Partnership, or shall become bankrupt, or any execution upon any judgment against said partnership be levied upon his interest and not released within sixty days, or, in the event of said partner's interest in and to the Co-Partnership being charged with the payment of any judgment against or other obligation of said partner, or in the event that Party of the Fifth Part shall become ill and such illness shall prevent him from performing his duties as a co-partner for a period of sixty (60) consecutive days or an aggregate of one hundred twenty (120) days in any one calendar year, or shall become in any way incapable of per-

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forming his part of this Co-Partnership contract or in the event that said Party of the Fifth Part shall elect or attempt to dissolve or terminate this Co-Partnership or shall bring any proceedings for the dissolution or termination hereof, then and in either or any of said events, the remaining partners hereto, other than Party of the Fifth Part and irrespective whether caused by the fault, wrong, negligence or otherwise of said remaining partners, any or either thereof may terminate the interest of such partner in and to the Co-Partnership and its assets and the said remaining partners, other than the said Party of the Fifth Part, are hereby granted an exclusive and irrevocable right and option to purchase the interest of said co-partner in and to the Co-Partnership.

(2) The term of the option under the foregoing subdivision (1), the purchase price and manner of payment thereof shall be as is provided in the following division (d) of this Article X.

(3) In the event that the option under the foregoing subdivision (1) be not exercised by the said remaining partners, the Co-Partnership shall continue to the expiration of the then existing term hereof, excepting only that the partner violating the provisions hereof shall not be entitled to receive any salary and the remaining partners shall be entitled to a reasonable salary in such amount and payable at such times as said remaining parties shall determine.

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(c)

(1) In the event of the death of any party hereto, the remaining partners, including said Party of the Fifth Part, may terminate the interest of such deceased partner in and to the Co-Partnership and the remaining parties, including said Party of the Fifth Part, are hereby granted an exclusive and irrevocable option to purchase the interest of such deceased partner in and to the Co-Partnership and its assets.

The term of the option under the foregoing paragraph, the purchase price and the manner of payment thereof shall be as is provided in division (d) of this Article X.

(2) In the event that the option granted under the foregoing subdivision (1) of this division (c) shall not be exercised, the Co-Partnership, as between the surviving partners and the deceased co-partner, shall be deemed dissolved, though not terminated; excepting, however, that the surviving co-partners shall have the right to operate and conduct the Co-Partnership business and affairs until the expiration of the then existing term hereof. In the event that the surviving partners shall elect to continue to operate and conduct the Co-Partnership business and affairs until the expiration of the then existing term hereof, the interest of the deceased partner, his heirs, executors, administrators, successors and assigns, in and to the capital and profits and losses, shall be reduced in the proportion that the proceeds of the life insurance, if any, the pre-

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miums of which shall have been paid for by the Co-Partnership, as provided by Article XI hereof, bears to the total of the capital of such deceased co-partner and the interest of each of the surviving co-partners in and to the capital and in and to the profits and losses, shall be increased in the proportion and each shall succeed to such proportion as the then interest of each such surviving partner in the "distributable net profits" bears to the total interest of all of the surviving partners in and to the "distributable net profits". In such event, the surviving partners shall have the exclusive right of conducting, managing and carrying on the business of the Co-Partnership, and neither the heirs, executors, administrators, or other personal representative of such deceased co-partner shall have any interest whatsoever in and to the business of the Co-Partnership, or any voice in the management or conduct of the business or affairs of the Co-Partnership; the only right on the part of such heirs or executors or administrators or other personal representative of such deceased co-partner, shall be to receive the said share of the profits or capital of such deceased co-partner, as reduced, as hereinbefore provided, in accordance with and at the times and in the amounts as provided by the covenants hereof; excepting only, however, that any obligation or liability created or incurred by said surviving partners in the operation of said business shall be binding only upon the surviving partners and the interest of said deceased co-partner, his

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heirs, executors, administrators, successors and assigns, in and to the Co-Partnership, but shall not be binding upon nor create any personal obligation or liability upon such heirs, executors, administrators, successors and assigns of said deceased co-partner. In such event, neither the heirs nor executors nor other personal representative of such deceased co-partner shall be entitled to receive any salary; the surviving partners, however, shall be entitled to receive a reasonable salary in such amount and payable at such times as said surviving partners shall from time to time determine.

(d)

(1) In the event of the occurrence of any act giving rise to the right of purchase as provided by the foregoing divisions (a) and/or (b) and/or (c) hereof, and if a partner entitled to exercise said option shall desire to exercise said option, he shall give written notice to the partner whose interest is to be purchased or unto his administrator, executor or other personal representative, of his intention to exercise said option, said notice to be given within three months after actual knowledge of the event giving rise to the right of purchase. Said notice of exercise of option shall be served either personally or by registered mail, postage prepaid, addressed to the party to whom said notice is to be given, at his last known residence or business address and said notice shall be deemed effective either when personally served or when deposited into the United States Mail, in an envelope addressed to

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said party to whom said notice is to be given, at his last known residence or business address, postage prepaid, registered, return receipt requested. Said date is sometimes hereinafter designated as the "effective date" of exercise of option.

(2) The purchase price shall be a sum equal to the interest of the partner (whose interest is to be purchased) in the capital and in and to any earned and undistributed profits, if any, and any other debt owing to such co-partner on the part of the Co-Partnership, less any incurred but unpaid losses and if the purchase be by reason of the death of one of the co-partners under the option conferred by the foregoing division (c), less the proceeds of the life insurance, if any, the premiums of which shall have been paid for by the Co-Partnership as provided by Article XI hereof, all as shall be shown by a certified audit to be made by the then accountants of the Co-Partnership in accordance with the usual accounting practices theretofore followed by the Co-Partnership, subject, however, to the definitions and limitations of the following division (e) as of the effective date of the notice of exercise of option; provided, however, that if the purchase be by Party of the First Part and/or Party of the Second Part and/or Party of the Third Part and/or Party of the Fourth Part of the interest of Party of the Fifth Part for any reason other than the death of said Party of the Fifth Part and if the effective date of the notice of exercise of option be a date more than ninety (90) days prior to the ex-

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piration of the then existing minimum term, the purchase price of the interest of said Party of the Fifth Part shall be increased by a sum equal to his salary for a period of sixty (60) days as provided by the provisions of division (2) of Article VI hereof.

(3) The purchase price shall be payable as follows, to wit:

(a) The purchasing partner shall, immediately after service of said notice of intention to exercise said option, cause an escrow to be opened in the escrow department of any national trust and savings bank within the City of Los Angeles; said escrow shall be between the said purchasing partner and said partner whose interest is to be purchased.

(b) The purchasing partner shall deposit in said escrow at the time of the opening thereof, a sum believed by him to be equal to twenty-five (25%) per cent of said purchase price.

(c) If the purchase price be of the interest of Party of the Fifth Part and other than in the event of his death, the balance of the purchase price shall be deposited into said escrow within thirty (30) days after receipt of the certified audit hereinbefore provided for.

(d) In all instances, other than as provided by the foregoing subparagraph (c), within a reasonable time after the receipt of the certified audit hereinbefore provided to be made, he shall deposit into said escrow his non-negotiable note wherein the said partner whose interest is to be purchased

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shall be the payee, the amount of said note to be in the amount of the balance of the said purchase price; said note shall be payable in not more than six (6) quarterly equal installments, together with interest at the rate of four (4%) per cent per annum upon the unpaid balances from time to time, interest payable quarterly; said note shall by its terms provide that in the event that the maker shall default in the payment of any installment of interest or principal when due, or in the event that the maker shall, prior to the payment in full thereof, sell his interest in or withdraw from said co-partnership, or die, or in the event that said Co-Partnership, as between and among the surviving partners shall be dissolved, or shall liquidate, or shall sell all or substantially all of its assets, then and in any of said events, the holder of said note may declare the entire balance immediately due and payable; and said note shall further provide by its terms that in the event of any action being brought thereon the maker agrees to pay a reasonable attorney's fee. Said escrow may provide that the said purchase price shall only be paid over unto the said partner whose interest is to be purchased, or the person entitled thereto, when there shall be transferred unto the purchasing partner the right, title, interest and estate of the partner whose interest is to be purchased in and to the said Co-Partnership and its assets, free and clear of and from the event or act giving rise to the right of purchase.

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(e) Upon opening of said escrow and the payment therein of the said sum, and the deposit therein of said note as hereinbefore in the foregoing subparagraphs provided, or the deposit of the balance of the purchase price as in the said subparagraphs provided, if the purchase be of the interest of Party of the Fifth Part other than by reason of his death, the interest of the partner whose interest is being purchased thereby shall terminate and cease and the partner exercising the said rights and option shall succeed to all of the right, title, interest and estate of the said partner whose interest is thereby being purchased, in and to the Co-Partnership and its assets, free and clear of and from the event or act giving rise to the right of purchase as of the effective date of the notice of exercise of option.

(e) In determining the purchase price under any of the foregoing provisions of this Article X: No value shall be set upon and no provision shall be made for the goodwill, if any, of the Co-Partnership; no value shall be set upon any of the trade names, trade-marks, leaseholds, leasehold improvements and fixtures, unless any value thereof be set forth upon the books of the Co-Partnership; all stock in trade shall be valued at its cost or replacement value or market value, whichever is the lower, less ten (10%) per cent; all other assets shall be by the accountants valued at book value.

(f) In paying the purchase price under any of the foregoing subdivisions of this Article, the pur-

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chasing partners may use any funds of the said Co-Partnership to which the partner whose interest is to be purchased would otherwise be entitled.

(g) In the event that there shall be more than one partner entitled to exercise the option granted by divisions (a) and/or (b) and/or (c) of this Article, each shall have the right, option or duty to purchase said proportion of the interest of the partner whose interest is to be purchased as the interest of each of said purchasing partners in and to the "distributable net profits" bears to the total interest of all of said purchasing partners in and to the "distributable net profits". In the event that any partner entitled to exercise said option shall not elect so to do, the remaining partners also so entitled may exercise said option as to the entire interest of the partner whose interest is to be purchased.

(h) Neither the failure to exercise the said options granted by subdivisions (a) and/or (b) and/or (c) of this Article, or the exercise thereof, shall cause a dissolution of this Co-Partnership as between or among the remaining partners.

(i) In the event of the exercise of the options granted by subdivisions (a) and/or (b) and/or (c) of this Article, the purchasing partner shall in writing assume and agree to pay when due, all obligations of the Co-Partnership scheduled in the Certified Audit hereinbefore provided to be made and shall agree to forever indemnify and save harmless the partner whose interest is to be pur-

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chased, his heirs, executors, administrators, successors and assigns, from any and all loss by reason thereof.

Article XI.

The Co-Partnership may take out and pay all premiums under policies of life insurance upon the lives of any one or more of the co-partners. The principal amount thereof shall be such as shall be determined by the partners.

Such policies shall be payable in favor of such person or persons as the partner upon whose life the policy shall be issued shall designate.

Such policies shall, if possible, confer upon the Co-Partnership the right to borrow upon and against said policies the full loan value thereof whenever the partners shall deem it necessary so to do, and in such event, the partnership shall have no liability whatsoever to the partner upon whose life said policy shall issue or to the beneficiary thereunder for the repayment thereof.

Upon the death of any partner, upon whose life a policy of life insurance shall have been taken out as herein provided, the said insurance upon his life shall be paid as far as this Co-Partnership is concerned, to said named beneficiary. In the event that the proceeds of said insurance shall be equal to or exceed the interest of the deceased in and to the Co-Partnership, neither this Co-Partnership nor the remaining co-partners shall have any right, title, interest, estate or claim in, to, upon or against the proceeds of said life insurance, but in such event,

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the interest of the said deceased in and to the capital and profits and losses shall terminate and the interest of each of the surviving co-partners in and to the capital and in and to the profits and losses shall be increased in the proportion and each shall succeed to such proportion as the then interest of each surviving partner in the "distributable net profits" bears to the total interest of all of the surviving partners in and to the said "distributable net profits". In the event that the proceeds of said life insurance shall be less than the interest of said deceased in and to the said Co-Partnership, the interest of the said deceased co-partner, his heirs, executors, administrators, successors and assigns in and to the capital and profits and losses shall be reduced in the proportion that the proceeds of the said life insurance, if any, bears to the total of the capital of such deceased co-partner and the interest of each of the surviving co-partners in and to the capital and in and to the profits and losses shall be increased in the proportion and each shall succeed to such proportion thereof as the then interest of each such surviving partner in the "distributable net profits" bears to the total interest of all of the surviving partners in and to the "distributable net profits".

Article XII.

1. In the event of the termination of this Co-Partnership, expressly subject, however, to the provisions of Article X and particularly divisions (a), (b) and (c) thereof, the liabilities of the Co-Part-

Plaintiffs' Exhibit No. 15—(Continued)

nership as hereinafter in the following division 3 of this Article XII defined, shall be paid or amply provided for in the order and priority as thereby provided.

2. The payment of a debt or liability shall be deemed to have been adequately provided for if the payment thereof shall have been assumed or guaranteed in good faith by one or more financially responsible persons or corporations or other form of business organization, whether a partner hereto or not, and such provision was determined in good faith and with reasonable care by a majority of the then partners hereof to be adequate at the time of any distribution of the assets upon such expiration.

3. The liabilities of the Co-Partnership shall be paid in the following order and priority, to wit:

(a) Those owing to creditors other than partners.

(b) Those owing to partners other than for contributed capital, earned capital or distributable net profits.

(c) Those owing to partners in respect of contributed capital.

(e) Those owing to partners in respect of distributable net profits.

Article XIII.

If at any time during the continuance of this Co-Partnership, the partners shall deem it necessary or expedient to make any amendment or addition to or deletion in any article, clause, phrase, paragraph, sentence or word herein contained for the

Plaintiffs' Exhibit No. 15—(Continued)

more advantageous or satisfactory management of the Co-Partnership business, such may be made by any writing executed by the partners entitled to receive a majority of the distributable net profits and thereupon such amendment or addition shall have the same force and effect as if the same had been originally embodied in and formed a part of these articles, or, in the event of any deletion, as if the said deletion had not been a part hereof, excepting only that the salary of Party of the Fifth Part, the subject of Article VI, division (2) and the participation of said party in the net profits the subject of Article VI division (1) and the rights granted unto said party by the provisions of Article X, shall not be affected without his written consent.

Article XIV.

1. Throughout these Articles of Co-Partnership the singular shall include the plural, the plural shall include the singular, the feminine shall include the masculine and neuter gender, and the masculine shall include the feminine and neuter gender.

2. Whenever in these Articles of Co-Partnership it is provided for any act to be done or designated by the co-partners, it refers to and means the then partners entitled to receive a majority of the "distributable net profits".

3. Unless otherwise specifically provided in these Articles of Co-Partnership, and subject to the provisions of Article X hereof, and particularly division (a), (b) and (c) thereof, the partners entitled

Plaintiffs' Exhibit No. 15—(Continued)

to receive a majority of the "distributable net profits" at said times shall control in all matters requiring the determination of the partners.

Provided, however, if such majority cannot agree, or in the event of an equal division of the co-partners upon any matter, the Party of the First Part shall have the right, power and authority to make the final and conclusive decision thereon during his lifetime.

4. Any audit that shall be made as provided by any of the provisions of these Articles of Co-Partnership, including by way of specification and not by way of limitation the provisions of Articles I, V, VI, VIII, X and XII, or any division, subdivision or paragraph thereof, shall be conclusive upon each of the partners hereto as to the interest of each partner in and to the capital and in and to the earned and undistributed profits, if any, and in and to the "distributable net profits" and as to any obligation owing by the Co-Partnership to any partner, and as to any other matter, the subject thereof.

5. Any notice by these Articles of Co-Partnership authorized to be given, shall be deemed to be duly given if delivered personally to the person to whom it is authorized to be given, or sent by registered mail, postage prepaid, addressed to him at his usual or last known place of abode. Any notice to be given to the Co-Partnership shall be given to it in writing at its office.

Plaintiffs' Exhibit No. 15—(Continued)

Article XV.

This Co-Partnership is formed under the Uniform Partnership Act as now in force in the State of California, being Title X, Division Third, Part IV of the Civil Code of the State of California, and there is incorporated herein and made a part hereof each and all of the provisions thereof; excepting, however, such portions of the provisions thereof as may be inconsistent herewith, in which event, the provisions hereof shall govern; and excepting further that there is expressly excluded herefrom, and each of the partners hereto does hereby expressly waive, the right to rely upon or to claim any rights under or by virtue of the provisions of Section 2402, subdivision (1); Section 2403, subdivision (3); Section 2412, subdivisions (a), (e), (f), (h); Section 2427; Section 2431; Section 2436 of the Civil Code of the State of California.

Article XVI.

These Articles of Co-Partnership are executed in as many parts as there are partners hereto, and each of such parts is hereby declared to be an original; all, however, shall constitute but one and the same agreement.

These Articles of Co-Partnership shall be binding upon and inure to the benefit of the heirs, executors, administrators, successors and assigns of each of the parties hereto.

In Witness Whereof, the parties hereto have

Plaintiffs' Exhibit No. 15—(Continued)

hereunto set their hands and seals the day and year first above written.

/s/ By JACK SMITH,
Party of the First Part or First
Co-Partner.

/s/ By ROSE MAE SMITH,
Party of the Second Part or Second
Co-Partner.

Jack Smith As Original Trustee of the Barbara Ann Smith Trust, a Voluntary Express Trust, in His Representative Capacity.

/s/ By JACK SMITH,
Party of the Third Part or Third
Co-Partner.

Rose Mae Smith, As Original Trustee of the Howard Samuel Smith Trust, a Voluntary Express Trust, in Her Representative Capacity.

/s/ By ROSE MAE SMITH,
Party of the Fourth Part or
Fourth Co-Partner.

/s/ By HERMAN WEISHAUP, 12
Party of the Fifth Part or Fifth
Co-Partner.

PLAINTIFFS' EXHIBIT No. 16

AGREEMENT

This Agreement made and executed as of the 2nd day of January, 1948, by, between and among Jack Smith, hereinafter sometimes designated as "Jack", Rose Mae Smith, hereinafter sometimes designated as "Rose", the Barbara Ann Smith Trust, a voluntary express trust, hereinafter sometimes designated as "Barbara Trust", and the Howard Samuel Smith Trust, a voluntary express trust, hereinafter sometimes designated as "Howard Trust",

Witnesseth:

Whereas, "Jack", as Trustor, heretofore created "Howard Trust", for the benefit of Howard Samuel Smith, as primary beneficiary, and "Rose", as Trustor, heretofore created "Barbara Trust" for the benefit of Barbara Ann Smith, as primary beneficiary; and

Whereas, "Jack" is the original Trustee of "Barbara Trust" and "Rose" is the original Trustee of "Howard Trust"; and

Whereas, "Jack", "Rose", "Barbara Trust" and "Howard Trust" are all copartners in and are all of the copartners of Boston Shoe Company, a co-partnership, hereinafter sometimes designated as "Co-partnership"; and

Whereas, in the year 1947 the United States Government announced that income which, pursuant to the Articles of the said "Co-partnership", was the income of the respective trusts would nonetheless be treated for tax purposes as though it were

Plaintiffs' Exhibit No. 16—(Continued)

income of respectively "Jack" and "Rose", and assessed deficiencies against "Jack" and "Rose" accordingly; and

Whereas, similar action has been taken by the State of California; and

Whereas, it is contemplated that "Jack" and "Rose", for the benefit of the respective trusts, will seek a refund of such taxes as they may have paid on income, in fact and in truth the income of the respective trusts but nevertheless credited to them for income tax purposes; and

Whereas, it was the intention of all the parties hereto in participating in the said "Copartnership" that each copartner thereof should bear the burden of income taxes on the share of copartnership income to which each partner would be entitled, and the "Copartnership" can be continued on no other basis;

Now, Therefore, It Is Hereby Agreed:

Article I.

I.1. Beginning as of the first year in which the "Co-partnership" was in existence and continuing thereafter so long as either of the said trusts remain existent, and also copartners in said "Copartnership", each trust shall advance and pay unto the trustor of that trust, in order that the trustor may pay the taxes on what is in truth and in fact the income and the taxes of the trust out of and from its assets, a sum equal to the amount of income taxes, including any interest or penalties thereon,

Plaintiffs' Exhibit No. 16—(Continued)

which have been, are or shall hereafter be assessed against the respective trustor by the United States or any State or territory thereof, or be payable by him by reason of said Government crediting to him for tax purposes, the income which, in truth and in fact, was, is and will be the income of the said trust as copartner of said "Copartnership", and the income taxes which are in truth and in fact taxes of said trust.

I.2. If either trustor shall be required to pay income taxes on any payment made to him pursuant to the terms of division 1 of this Article I, then the respective trust shall pay that trustor, out of and from the assets of each, a sum equal to such payment.

I.3. In determining the sum equal to taxes paid by either trustor for the purposes of the foregoing divisions of this Article I, all taxes shall be computed according to the rate at which the income of the respective trusts would have been taxed had they each paid their own taxes on the share of the copartnership income to which each is, was or may be entitled by the terms of said Articles.

Article II.

Should the United States or any state or territory thereof hereafter refund to either trustor any of the taxes paid by him on income credited to him for tax purposes, which was in truth and in fact the income of the trust of which he is trustor, that trustor shall pay therefrom unto that trust a sum

Plaintiffs' Exhibit No. 16—(Continued)

equal to all taxes, including interest and penalties thereon, assessed against or payable by the said trust for each year as to which that trustor shall have received such refund; such payments to be at least equal to all sums paid or payable to that trustor by that trust hereunder.

Article III.

Nothing herein shall be deemed to be a statement or admission by the parties hereto that any income of the said trusts, or either of them, on account of the said "Copartnership", or otherwise, is properly, legally or otherwise owned by or taxable to either trustor, nor that said "Copartnership" is not a valid, bona fide partnership existing under and by virtue of the Articles of said "Copartnership", by reason whereof each of said trusts is entitled to the percentage of the net income of said "Copartnership", as by said Articles provided.

Article IV.

Throughout this Agreement, the singular shall include the plural and the plural shall include the singular; the masculine shall include the feminine and neuter genders, the feminine shall include the masculine and neuter genders, and the neuter shall include the masculine and female genders.

Article V.

This Agreement is executed in six (6) parts; each part is hereby declared to be an original; all, however, shall constitute but one and the same Agreement.

Plaintiffs' Exhibit No. 16—(Continued)

In Witness Whereof, the parties hereto have hereunto set their hands and seals as of the day and year first above written.

/s/ By JACK SMITH

/s/ By ROSE MAE SMITH

Barbara Ann Smith Trust, a Voluntary Express Trust

/s/ By JACK SMITH, Trustee.

Howard Samuel Smith Trust, a Voluntary Express Trust

/s/ By ROSE MAE SMITH, Trustee.

PLAINTIFFS' EXHIBIT No. 17

Boston Shoe Company

CONDENSED BALANCE SHEET

As of September 30, 1943

Assets

Cash	50.00
Accounts Receivable	130,232.93
Notes Receivable	1,997.95
Merchandise Inventory ...	171,161.59
Fixed	2,541.55
Other	722.95

Total Assets 306,706.97

Liabilities and Capital

Liabilities:

Bank Overdraft	17,516.64	
Other	41,534.68	59,051.32

Capital—Jack Smith 247,655.65

Total Liabilities and Capital 306,706.97

PLAINTIFFS' EXHIBIT No. 18

BOSTON SHOE COMPANY
CONDENSED BALANCE SHEETS

October 1, 1943 to June 30, 1948

	(Admission of New Partner)							
	As of October 1, 1943	As of December 31, 1943	As of December 31, 1944	As of January 1, 1945	As of December 31, 1945	As of December 31, 1946	As of December 31, 1947	As of June 30, 1948
ASSETS								
Cash.....	50.00	4,823.50	73,088.83	73,088.83	44,875.23	110,968.90	75.00	5,329.53
Receivable—Partner (Herman Weisbaupf).....				22,200.00				
Receivable—Trade.....	132,230.88	104,427.81	80,258.25	76,739.39	67,518.99	94,388.17	144,372.13	180,085.36
Investments.....			25,000.00	25,000.00	125,828.12	126,059.89	101,337.50	100,000.00
Prepayment on Merchandise Purchase.....			200.00		42,498.79			
Inventory.....	171,161.59	219,013.98	129,605.23	97,487.16	72,238.70	141,031.33	359,637.35	216,216.87
Fixed Assets.....	2,541.55	2,371.06	1,689.10	1,689.10	3,445.35	5,991.69	7,724.40	9,212.12
Other Assets.....	722.95	1,403.20	1,629.39	1,629.39	2,784.80	2,135.76	1,307.32	2,714.46
Total Assets.....	<u>306,706.97</u>	<u>332,039.55</u>	<u>311,470.80</u>	<u>297,833.87</u>	<u>359,189.98</u>	<u>480,575.74</u>	<u>614,453.70</u>	<u>513,555.34</u>
LIABILITIES AND CAPITAL								
Current Liabilities.....	59,051.32	61,777.31	40,881.98	5,045.05	44,860.33	51,018.68	285,180.28	154,854.70
Loans Payable to Partners.....	(a) 47,655.65	(a) 38,141.46	(a) 3,043.12	(b) 70,588.82				
Capital.....	200,000.00	232,120.78	267,545.70	222,200.00	314,329.65	429,557.06	329,273.42	358,700.64
Total Liabilities and Capital.....	<u>306,706.97</u>	<u>332,039.55</u>	<u>311,470.80</u>	<u>297,833.87</u>	<u>359,189.98</u>	<u>480,575.74</u>	<u>614,453.70</u>	<u>513,555.34</u>

Notations:

(a) Jack Smith	29,793.80
(b) Jack Smith	11,624.46
Rose Smith	14,585.28
Howard Smith Trust	14,585.28
Barbara Ann Smith Trust	

70,588.82

PLAINTIFFS' EXHIBIT No. 19
BOSTON SHOE COMPANY
ANALYSIS OF PARTNERS' CAPITAL ACCOUNTS

October 1, 1943 to June 30, 1948

Date	Jack Smith		Rose Smith		Howard S. Smith Trust		Barbara Ann Smith Trust		Herman Weishaupt		Total Capital
	Dr.	Cr.	Dr.	Cr.	Dr.	Cr.	Dr.	Cr.	Dr.	Cr.	
10/ 1/43	Balance.....	80,000.00		60,000.00		30,000.00		30,000.00			200,000.00
12/31/43	Net Profit 10/ 1/43-12/31/43.....	13,891.77		10,418.83		5,209.41		5,209.41			
	Drawings.....		2,608.64								
	Balance.....	93,891.77		67,810.19		35,209.41		35,209.41			232,120.78
12/31/44	Net Profit 1/1/44-12/31/44.....	38,790.79		29,093.10		14,546.54		14,546.54			
	Drawings.....	25,931.88		25,278.83		5,170.67		5,170.67			
	Balance.....	106,750.68		71,624.46		44,585.28		44,585.28			267,545.70
1/ 1/45	Admittance of new partner.....									22,200.00	
	Excess of old capital over new capital transferred to loans payable and made available for withdrawal by old partners.....	26,750.68		11,624.46		14,585.28		14,585.28			
	Balance—new partnership.....	80,000.00		60,000.00		30,000.00		30,000.00		22,200.00	222,200.00
12/31/45	Net Profit 1/1/45-12/31/45.....	42,199.93		31,649.95		15,824.97		15,824.97		11,722.21	
	Drawings.....	7,657.91		6,390.96		3,669.59		3,669.59		3,704.33	
	Balance.....	114,542.02		85,258.99		42,155.38		42,155.38		30,217.88	314,329.65
12/31/46	Net Profit 1/1/46-12/31/46.....	77,163.23		58,097.42		29,048.71		29,048.71		21,517.57	
	Drawings.....	37,136.24		31,014.92		5,731.83		5,737.76		20,327.48	
	Balance.....	154,869.01		112,341.49		65,472.26		65,466.33		31,407.97	429,557.06
12/31/47	Reduction of reserve for bad debts for calendar years 1943 and 1944 per revenue agent's report.....	4,452.61									
	Net Profit 1/1/47-12/31/47.....	19,174.93		14,381.20		7,190.60		7,190.60		5,326.37	
	Drawings.....	64,846.02		52,694.77		14,768.31		14,773.34		10,917.51	
	Balance.....	113,650.53		74,027.92		57,894.55		57,883.59		25,816.83	329,273.42
6/30/48	Net Profit 1/1/48-6/30/48.....	18,815.99		14,111.98		7,056.00		7,056.00		5,226.67	
	Drawings (incl. credits to trusts).....	16,894.82		10,047.78		2,520.28		2,520.28		937.38	
	Balance.....	115,571.70		78,092.12		67,470.83		67,459.87		30,106.12	358,700.64

PLAINTIFF'S EXHIBIT No. 20
BOSTON SHOE COMPANY
ANALYSIS OF PARTNERS' DRAWING ACCOUNTS
October 1, 1943 to June 30, 1948

Year	Howard S. Smith				Barbara Ann Smith		Herman Weisaupt
	Jack Smith	Rose Smith	Trust	Trust	Trust	Trust	
1943							
Income Taxes .....	.....	2,467.35	.....	.....	.....	.....	.....
Personal	6,250.00	741.29	.....	.....	.....	.....	.....
Less Salary	6,250.00	3,208.64	.....	.....	.....	.....	.....
		600.00	.....	.....	.....	.....	.....
Net Drawings .....	.....	2,608.64	.....	.....	.....	.....	.....
1944							
Income Taxes .....	.....	14,528.83	.....	.....	.....	.....	.....
Personal and Misc.....	50,931.88	13,150.00	.....	.....	.....	.....	.....
Investments .....	.....	.....	3,750.00	.....	.....	.....	.....
Less Salary	50,931.88	27,678.83	.....	.....	.....	.....	.....
	25,000.00	2,400.00	.....	.....	.....	.....	.....
Net Drawings	25,931.88	25,278.83	.....	5,170.67	.....	5,170.67	.....
1945							
Income Taxes	4,798.67	5,299.11	.....	3,669.59	.....	3,669.59	704.33
Personal	27,859.24	3,491.85	.....	.....	.....	.....	9,000.00
Less Salary	32,657.91	8,790.96	.....	3,669.59	.....	3,669.59	9,704.33
	25,000.00	2,400.00	.....	.....	.....	.....	6,000.00
Net Drawings	7,657.91	6,390.96	.....	3,669.59	.....	3,669.59	3,704.33
1946							
Income Taxes	29,062.15	23,114.92	.....	5,731.83	.....	5,737.76	7,364.18
Personal	33,074.09	10,300.00	.....	.....	.....	.....	18,963.30
Less Salary	62,136.24	33,414.92	.....	5,731.83	.....	5,737.76	26,327.48
	25,000.00	2,400.00	.....	.....	.....	.....	6,000.00
Net Drawings	37,136.24	31,014.92	.....	5,731.83	.....	5,737.76	20,327.48
1947							
Income Taxes	73,051.61	52,029.57	.....	12,266.31	.....	12,273.34	8,194.32
Personal	16,794.41	3,065.20	.....	.....	.....	.....	8,723.19
Loan .....	.....	.....	2,500.00	.....	.....	2,500.00	.....
Less Salary	89,846.02	55,094.77	.....	14,766.31	.....	14,773.34	16,917.51
	25,000.00	2,400.00	.....	.....	.....	.....	6,000.00
Net Drawings	64,846.02	52,694.77	.....	14,766.31	.....	14,773.34	10,917.51
1948							
Income Taxes	13,864.09	9,800.08	.....	.....	.....	.....	3,997.38
Personal	15,530.73	1,447.70	.....	.....	.....	.....	.....
Repayment of Loan and Interest .....	.....	.....	(2,520.28)	.....	.....	(2,520.28)	.....
Less Salary	29,394.82	11,247.78	.....	(2,520.28)	.....	(2,520.28)	3,997.38
	12,500.00	1,200.00	.....	.....	.....	.....	3,000.00
Net Drawings	16,894.82	10,047.78	.....	(2,520.28)	.....	(2,520.28)	997.38

PLAINTIFFS' EXHIBIT No. 21
 SCHEDULE OF RECEIPTS-DISBURSEMENTS-INVESTMENTS
 HOWARD SAMUEL SMITH TRUST
 12/28/42 to 12/31/48

		Receipts	Disbursements
12/28/42	Gift from Jack and Rose Smith.....	\$ 4,000.00	.....
	Interest 12/28/42 to 6/30/48.....	183.50	.....
9/28/43	Gift from Jack and Rose Smith.....	30,121.20	.....
	Misc. Savings and Interest 1/27/33-6/30/48.....	141.40	.....
12/31/43	Income Inv. Boston Shoe Co.—1943.....	5,209.41	.....
1944	Federal Income Tax Payments.....	.....	1,269.58
	Calif. State Income Tax Payments.....	.....	51.09
	Interest—Union Bank	1.65	.....
12/31/44	Income Inv.—Boston Shoe Co.—1944.....	14,546.54	.....
1945	Federal Income Tax Payments ($\frac{3}{4}$).....	.....	3,606.61
	Calif. State Income Tax Payments ($\frac{1}{3}$).....	.....	62.98
	Federal Income Tax Payments ($\frac{1}{4}$).....	.....	1,202.20
	Calif. State Income Tax Payments ($\frac{2}{3}$).....	.....	125.95
	Interest on Federal Tax.....	.....	.15
	Interest on State Tax.....	.....	.20
12/31/45	Income Inv—Boston Shoe Co.—1945.....	15,824.97	.....
1945	Interest Union Bank	55.98	.....
1946	Federal Income Tax Payments.....	.....	5,509.73
	Calif. State Income Tax Payments.....	.....	222.10
	Interest Union Bank	74.00	.....
12/31/46	Income Inv—Boston Shoe Co.—1946.....	29,048.71	.....
1947	Federal Income Tax Payments.....	.....	11,531.88
	Calif. State Income Tax Payments.....	.....	736.43
	Interest Union Bank.....	74.36	.....
12/31/47	Income Inv—Boston Shoe Co.—1947.....	7,190.60	.....
2/24/48	Interest—Loan to Ben Breiman.....	20.28	.....
6/30/48	Interest Union Bank	37.30	.....
6/30/48	Income Inv—Boston Shoe Co.—1948.....	7,056.00	.....
6/30/48	Tax Adjustment 10/1/43 to 12/31/47.....	.....	37,289.73
12/31/48	Interest Coast Fed. Sav. Bk.....	74.79	.....
	Interest Republic Fed. Sav. Bk.....	74.78	.....
	Interest Western Fed. Sav. Bk.....	64.86	.....
7/ 9/48	Cash gift Jack and Rose Smith.....	.03	.....
	Totals	113,800.36	61,608.63
	Net Worth .....	.....	52,191.73
		<u>113,800.36</u>	<u>113,800.36</u>

Plaintiffs' Exhibit No. 21—(Continued)

**SCHEDULE OF INVESTMENTS
HOWARD SAMUEL SMITH—TRUST**

12/28/42 to 12/31/48

Union Bank & Trust Co. Savings:			Balance at
(½ Joint Acct. Howard and Barbara Smith)			12/31/48
12/28/42	(Gift from J&R Smith)	Invest	4,000.00
	Interest 12/28/42 to 6/30/48	Withdraw	183.50
6/30/48			4,183.50
Misc. Deposits & Int. 1/27/33 to 6/30/48			
6/30/48			141.40
U. S. Savings Bonds			
2/16/44	Tfr. from B.S.C.		100.00
3/14/44	Tfr. from B.S.C.		121.20
1944	Interest		1.65
2/20/45	Tfr. from B.S.C.		14,585.28
6/13/45	(Fed. Inc. Tax Payment)		1,202.35
8/13/45	(Cal. St. Inc. Tax Payment)		126.15
1945	Interest		55.98
2/20/45	Purchase U. S. Sav. Bonds		3,750.00
1946	Interest		74.00
1947	Interest		74.36
6/30/48	Interest		37.30
7/9/48	Withdrawal		9,971.27
			15,049.77
U. S. Savings Bonds			
9/28/43	Gift from J&R Smith		30,000.00
10/1/43	To Boston Shoe Co.		30,000.00
11/29/44	Series E U. S. Savings Bonds		3,750.00
2/20/45	Series E U. S. Savings Bonds		3,750.00
			37,500.00
11/6/47	Loan to Ben Breiman		2,500.00
2/28/48	Paid in full		2,500.00
Savings & Loan Accounts:			
7/10/48	Coast Fed. Sav. Bk.		4,985.65
	Interest to 12/31/48		74.79
			5,060.44
7/14/48	Republic Fed. Sav. & Loan		4,985.65
	Interest to 12/31/48		74.78
			5,060.43
7/12/48	Western Fed. Sav. & Loan		4,321.90
	Interest to 12/31/48		64.86
			4,386.76
Investment—Boston Shoe Co.:			
10/1/43	Investment		30,000.00
2/16/44	1943 Share of Profits		5,209.41
11/29/44	Cash drawing (Dep. Union Bank)		100.00
1944	Cash drawing (U. S. Bonds)		3,750.00
	Fed. Inc. Tax Paid		1,269.58
	Cal. Inc. Tax Paid		51.09
1944	Share of Profits		14,546.54
2/20/45	Cash drawing (Dep. Union Bank)		14,585.28
1945	Fed. Inc. Tax Paid		3,606.61
	Cal. Inc. Tax Paid		62.98
1946	Share of Profits		15,821.97
	Fed. Inc. Tax Paid		5,509.73
	Cal. Inc. Tax Paid		222.10
1946	Share of Profits		29,048.71
1947	Fed. Inc. Tax Paid		11,531.88
	Cal. Inc. Tax Paid		736.43
11/6/47	Cash drawing (Loan to Ben Breiman)		2,500.00
6/30/48	1947 Share of Profits		7,190.60
2/24/48	1948 Share of Profits		7,056.00
6/30/48	Ret. of Loan and Int. from Breiman		2,520.28
	Tax Adjustment 10/1/43 to 12/31/47		37,289.73
			111,396.51
			81,215.41
			30,181.10

Boston Shoe Co. Total Investment

Total Investments as at 12/31/48

\$ 52,191.73

PLAINTIFFS' EXHIBIT No. 22
 SCHEDULE OF RECEIPTS—DISBURSEMENTS
 BARBARA ANN SMITH TRUST
 12/28/42 to 12/31/48

		Receipts	Disbursements
12/28/42	Gift from Jack and Rose Smith.....	\$ 4,000.00	.....
	Interest 12/28/42 to 6/30/48.....	183.51	.....
9/28/43	Gift from Jack and Rose Smith.....	32,250.00	.....
12/31/43	Income Inv—Boston Shoe Co.—1943.....	5,209.41	.....
1944	Federal Income Tax Payments.....	.....	1,269.58
	Calif. State Income Tax Payments.....	.....	51.09
	Interest—Union Bank	6.62	.....
12/31/44	Income Inv—Boston Shoe Co.—1944.....	14,546.54	.....
1945	Fed. Income Tax Payments ($\frac{3}{4}$).....	.....	3,606.61
	Calif. State Income Tax Pay ($\frac{1}{3}$).....	.....	62.98
	Fed. Income Tax Payments ($\frac{1}{4}$).....	.....	1,202.20
	Calif. State Income Tax Pay ($\frac{2}{3}$).....	.....	125.95
	Interest on Fed. Tax.....	.....	.15
	Interest on State Tax.....	.....	.20
12/31/45	Income Inv—Boston Shoe Co.—1945.....	15,824.97	.....
1945	Interest Union Bank	67.51	.....
1946	Federal Income Tax Payments.....	.....	5,515.32
	Calif. State Income Tax .....	.....	222.44
	Interest Union Bank	82.27	.....
12/31/46	Income Inv—Boston Shoe Co.—1946.....	29,048.71	.....
1947	Federal Income Tax Payments.....	.....	11,536.49
	Calif. State Income Tax.....	.....	736.85
	Interest Union Bank	82.62	.....
12/31/47	Income Inv—Boston Shoe Co.—1947.....	7,190.60	.....
2/24/48	Interest—Loan to Ben Breiman.....	20.28	.....
6/30/48	Interest Union Bank	41.43	.....
6/30/48	Income—Inv—Boston Shoe Co.—1948.....	7,056.00	.....
6/30/48	Tax Adjustment 10/1/43 to 12/31/47.....	.....	31,480.20
12/31/48	Interest Coast Fed. Sav. Bk.....	60.00	.....
	Interest Home Bldg. & Loan Assoc.....	60.00	.....
	Interest Los Angeles Fed. Sav. Bk.....	62.06	.....
	Interest Standard Fed. Sav. Bk.....	62.75	.....
7/ 9/48	Cash gift Jack and Rose Smith.....	.06	.....
	Total	115,855.34	55,810.06
	Net Worth .....	.....	60,045.28
		115,855.34	115,855.34

Plaintiffs' Exhibit No. 22—(Continued)

SCHEDULE OF INVESTMENTS
BARBARA ANN SMITH—TRUST

12/28/42 to 12/31/48

	Invest	Withdraw	Balance at 12/31/48
Union Bank & Trust Co. Savings:			
1½ Joint Acct. Howard & Barbara Smith)			
12/28/42 (Gift from J&R Smith)	4,000.00	.....	.....
Interest 12/28/42 to 6/30/48.....	183.51	.....	.....
6/30/48 Withdrawal.....	.....	4,183.51	.....
<hr/>			
2/16/44 Trf from B.S.C.....	100.00	.....	.....
3/14/44 Trf from B.S.C.....	2,250.00	.....	.....
1944 Interest.....	6.62	.....	.....
2/20/45 Trf from B.S.C.....	14,585.28	.....	.....
2/20/45 Purchase U. S. Sav. Bonds.....	.....	3,750.00	.....
6/13/45 Fed. Inc. Tax Payment.....	.....	1,202.35	.....
8/13/45 Cal. State Inc. Tax Payment.....	.....	126.15	.....
1945 Interest.....	67.51	.....	.....
1946 Interest.....	82.27	.....	.....
1947 Interest.....	82.62	.....	.....
6/30/48 Interest.....	41.43	.....	.....
7/9/48 Withdrawal.....	.....	12,137.23	.....
<hr/>			
U. S. Savings Bonds:	17,215.73	17,215.73	.....
9/28/43 Gift from J&R Smith.....	30,000.00	.....	.....
10/1/43 To Boston Shoe Co.....	.....	30,000.00	.....
11/29/44 Series E U. S. Savings Bonds.....	3,750.00	.....	.....
2/20/45 Series E U. S. Savings Bonds.....	3,750.00	.....	.....
<hr/>			
11/6/47 Loan to Ben Breiman.....	37,500.00	30,000.00	7,500.00
2/28/48 Paid in full.....	2,500.00	2,500.00	.....
<hr/>			
Savings & Loan Accounts:			
7/10/48 Coast Fed. Sav. & Loan Assoc.....	4,000.00	.....	4,060.00
Interest to 12/31/48.....	60.00	.....	.....
<hr/>			
7/10/48 Home Bldg. & Loan Assoc.....	4,000.00	.....	4,060.00
Interest to 12/31/48.....	60.00	.....	.....
<hr/>			
7/10/48 Los Angeles Fed. Sav.....	4,137.30	.....	4,199.36
Interest to 12/31/48.....	62.06	.....	.....
<hr/>			
7/12/48 Standard Fed. Sav. & Loan Assoc.....	4,183.50	.....	4,246.25
Interest to 12/31/48.....	62.75	.....	.....
<hr/>			
Investment—Boston Shoe Co.:			
10/1/43 Investment.....	30,000.00	.....	.....
1943 Share of Profits.....	5,209.41	.....	.....
2/16/44 Cash Draw (Dep. Union Bank).....	.....	100.00	.....
1944 Fed. Inc. Tax Paid.....	.....	1,269.58	.....
State Inc. Tax Paid.....	.....	51.09	.....
11/29/44 Cash Draw (U. S. Bonds).....	.....	3,750.00	.....
1944 Share of Profits.....	14,546.54	.....	.....
2/20/45 Cash Draw (Dep. Union Bank).....	.....	14,583.28	.....
1945 Fed. Inc. Tax Paid.....	.....	3,606.61	.....
State Inc. Tax Paid.....	.....	62.98	.....
1946 1945 Share of Profits.....	15,824.97	.....	.....
Fed. Inc. Tax Paid.....	.....	5,515.32	.....
State Inc. Tax Paid.....	.....	222.44	.....
1947 1946 Share of Profits.....	29,048.71	.....	.....
Fed. Inc. Tax Paid.....	.....	11,536.49	.....
State Inc. Tax Paid.....	.....	736.85	.....
11/6/47 Cash Draw (Loan to Ben Breiman).....	.....	2,500.00	.....
1947 Share of Profits.....	7,190.60	.....	.....
2/24/48 Ret. of Loan & Int. from Breiman.....	2,520.28	.....	.....
6/30/48 1948 Share of Profits.....	7,056.00	.....	.....
6/30/48 Tax Adjustment 10/1/43 to 12/31/47.....	.....	31,480.20	.....
<hr/>			
Boston Shoe Co. Total Investment.....	111,396.51	75,416.84	35,979.67

Boston Shoe Co. Total Investment.....

111,396.51

75,416.84

35,979.67

[Endorsed]: No. 14594. United States Court of Appeals for the Ninth Circuit. Jack Smith and Rose Mae Smith, Appellants, vs. Harry C. Westover, former Collector of Internal Revenue, and Robert A. Riddell, Director of Internal Revenue, Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: December 9, 1954.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14594

JACK SMITH and ROSE MAE SMITH,
Appellants,

vs.

HARRY C. WESTOVER, former Collector of Internal Revenue, and ROBERT A. RIDDELL, Director of Internal Revenue,
Appellees.

APPELLANTS' STATEMENT OF POINTS
AND DESIGNATION OF RECORD

Statement of Points

The appellants hereby state that they intend to rely on appeal upon the following points:

1. The District Court erred in ordering judgment for the defendants.
2. The District Court erred in adopting the findings of fact and conclusions of law filed by the defendants.
3. The District Court erred in adopting the judgment, docketed and entered on August 23, 1954.
4. The District Court erred in denying plaintiffs motions to amend findings and judgment and for a new trial.
5. The District Court erred in failing to find as a fact that the partnership involved herein was at all times a bona fide partnership entitled to full recognition for Federal income tax purposes.
6. The District Court erred in failing to enter judgment for the plaintiffs.

Designation of Record to be Printed

Pursuant to rule 17(6) of this Court, appellants hereby designate the following parts of the record as being necessary for consideration of the points upon which they intend to rely on this appeal, and desire to have printed, omitting the title of Court and cause from each of the documents designated for printing:

1. The complete record certified by the Clerk of the District Court to the Court of Appeals.
2. The District Court Clerk's certification of Record on Appeal.

3. This Statement of Points and Designation of Record on Appeal.

Dated: December 15, 1954.

Respectfully submitted,

LATHAM & WATKINS,
/s/ By DANA LATHAM,
/s/ By HENRY C. DIEHL

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 17, 1954. Paul P. O'Brien, Clerk.

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No. 14594

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JACK SMITH and ROSE MAE SMITH,

Appellants,

vs.

HARRY C. WESTOVER, former Collector of Internal
Revenue and ROBERT A. RIDDELL, Director of Internal
Revenue,

Appellees.

APPELLANTS' OPENING BRIEF.

Jurisdiction.

This is an appeal from a judgment for Appellees rendered by the United States District Court for the Southern District of California, Central Division, the Honorable Leon R. Yankwich presiding, and docketed and entered on August 23, 1954.

Said proceeding involves claims for the refund of federal income taxes and interest for the calendar years 1943 to 1948, inclusive, in the following total amounts:

By Appellant Jack Smith	\$56,965.08
By Appellant Rose Mae Smith	54,256.32
By Appellants jointly	8,557.73

Total

\$119,779.13

All of said amounts were paid to Appellee Harry C. Westover except \$2,955.17 for the calendar year 1948, which was paid to Appellee Robert A. Riddell.

Notice of this appeal was dated November 2, 1954 and was filed November 3, 1954, pursuant to the provisions of 28 U. S. C. A., Section 1291.

Opinion Below.

The only previous opinion rendered in this cause is the Memorandum Decision of Judge Yankwich, filed June 24, 1954 [Tr. 15-20]. Findings of Fact and Conclusions of Law were signed by the trial court August 23, 1954 [Tr. 20-30]. Judgment for Appellees was rendered August 23, 1954 [Tr. 30-31]. The trial court's Memorandum Decision and the Findings of Fact and Conclusions of Law are reported in 123 Fed. Supp. 354 (1954).

Issues Involved.

There are two issues involved:

(1) Did Appellees err in ignoring for the period from October 1, 1943 through December 31, 1944, a partnership evidenced by a written agreement, consisting of Appellants and two trusts, of which Appellants' children were beneficiaries, wherein assets were owned and profits and losses divided on the following basis:

Jack Smith	40%
Rose Mae Smith	30%
Jack Smith, Trustee for Barbara Ann Smith	15%
Rose Mae Smith, Trustee for Howard Samuel Smith	15%

and in taxing the income of the last two named partner trusts equally to Appellants.

Although no community property was involved Appellees did not challenge the partnership so far as the Appellants were concerned.

(2) Did Appellees err in ignoring for the period from January 1, 1945 through June 30, 1948, a partnership evidenced by a written agreement and consisting of Appellants and two trusts, of which Appellants' children were beneficiaries, together with a non-related individual, Herman Weishaupt, wherein assets were owned and profits and losses divided on the following basis:

Jack Smith	36%
Rose Mae Smith	27%
Jack Smith, Trustee for Barbara Ann Smith	13½%
Rose Mae Smith, Trustee for Howard Samuel Smith	13½%
Herman Weishaupt	10%

and in taxing the income of said two named partner trusts equally to Appellants.

Appellees approved the partnership with respect to Appellants and Weishaupt.

Statutes Involved.

The Internal Revenue Code of 1954 is not here applicable. References which follow involve the prior Internal Revenue Code (26 U. S. C. A.).

"Sec. 22. *Gross Income.*

"(a) General Definition.—'Gross income' includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including personal service as an officer or employee of a State, or any political subdivision thereof, or any

agency or instrumentality of any one or more of the foregoing), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. In the case of Presidents of the United States and judges of courts of the United States taking office after June 6, 1932, the compensation received as such shall be included in gross income; and all Acts fixing the compensation of such President and judges are hereby amended accordingly. In the case of judges of courts of the United States who took office on or before June 6, 1932, the compensation received as such shall be included in gross income.

“Sec. 181. *Partnership Not Taxable.*

“Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity.

“Sec. 182. *Tax of Partners.*

“In computing the net income of each partner, he shall include, whether or not distribution is made to him—

* * * * *

“(c) His distributive share of the ordinary net income or the ordinary net loss of the partnership, computed as provided in section 183(b).”

Statement of Facts.

This cause was submitted to the trial court by Appellants on the pleadings, a stipulation of facts, oral testimony and written exhibits. Appellees introduced no evidence.

While findings of fact were made by the trial court [Tr. 21-28], it is submitted that said findings are so at variance with the facts as disclosed by the record that a complete restatement thereof is required.

(1) Appellants, husband and wife, are both adult citizens of the United States and residents of the State of California [Tr. 21].

(2) Appellant Jack Smith entered the retail and wholesale shoe business in 1919 and has been engaged in that business alone and in partnership with others in Los Angeles since 1925. Said business was conducted under the name of Boston Shoe Company [Tr. 85].

(3) Appellants were married in 1931. Prior to said marriage Appellant Rose Mae Smith worked for Appellant Jack Smith in his sole proprietorship shoe business. She has been active in said shoe business on a regular day-to-day basis from prior to her marriage until the present [Tr. 63-64].

(4) Appellants have two children, Howard Samuel Smith, born in 1932, and Barbara Ann Smith, born in 1940. At the time of the trial of this proceeding Howard was 22 and Barbara was 14 [Tr. 68].

(5) On December 31, 1942, Appellant Jack Smith purchased from Appellant Rose Mae Smith her community interest in the proprietorship conducted under the name of the Boston Shoe Company [Tr. 65]. The transaction be-

tween the parties was occasioned by disagreement between them as to certain expenditures being made by Appellant Jack Smith [Tr. 87-89] and it was decided to define the interest of each Appellant in the business [Tr. 65]. Said sale was evidenced by a written agreement between the parties, dated December 31, 1942, the effect of which was to eliminate the parties' community interests and create separate estates in both Appellants [Ex. 2;* Tr. 164-169].

(6) At the time of said sale on December 31, 1942, the capital employed in the Boston Shoe Company, according to that concern's records, totalled \$254,277.68 [Tr. 92]. Appellants agreed that of said sum \$205,867.78 constituted community property and the balance separate property of Appellant Jack Smith acquired prior to marriage. Appellant Jack Smith agreed to pay Appellant Rose Mae Smith for her said community interest one-half of the book value of said community interest, or \$102,933.89. Said payments were made by the delivery to Appellant Rose Mae Smith of four interest-bearing notes due one, two, three, and four years respectively after the date of sale, the first three notes being in the amount of \$30,000 each and the last note in the amount of \$12,933.89 [Exs. 2, 3, 4, 5 and 6; Tr. 164-171].

(7) Immediately after the sale just referred to Appellant Rose Mae Smith gave considerable thought to creating trusts for the children, Howard and Barbara, and using the notes referred to, or the funds obtainable therefrom through borrowing, for the purchase of investment real estate for said children. No such real estate was acquired, however, because the prices asked were deemed too high [Tr. 65, 66, 70-71].

*All exhibits referred to are Appellants.

(8) From December 31, 1942, until immediately prior to October 1, 1943, Appellant Jack Smith operated the Boston Shoe Company as a sole proprietorship [Tr. 89].

(9) On or about December 28, 1942, the Appellants gave to each of their children \$4,000, depositing said sums in the bank in the names of the children with themselves as trustees. No written trust indenture was entered into at that time [Tr. 68-69, 93].

(10) On September 29, 1943, after substantial consideration, Appellant Rose Mae Smith, as trustor, created an irrevocable trust with her daughter Barbara Ann as beneficiary and Appellant Jack Smith as trustee. The corpus of said trust was one of the \$30,000 notes heretofore referred to which was duly transferred to said trust [Exs. 5 and 6, Tr. 171, 195].

Said trust instrument was in writing, was irrevocable, provided for successor trustees, including the Union Bank and Trust Company, provided that income should be accumulated until the beneficiary attained 21 with discretion to distribute income after 21, with one-fourth of principal and income to be distributed at 25, one-fourth at 30, and the balance at 35. In the event of prior death, to issue of the beneficiary, in the absence of issue, to brother Howard.

Said instrument was similar to *inter vivos* trusts in common use and specifically excluded both the trustor and trustee from any benefits thereof [Ex. 7; Tr. 171-193].

(11) On September 29, 1943, Appellant Jack Smith as trustor created a trust identical with that heretofore created by Appellant Rose Mae Smith except that Rose Mae Smith was named as trustee and Howard was named

as beneficiary. The corpus of said trust consisted of three \$10,000 United States Bonds which were duly transferred to said trust [Exs. 8 and 10; Tr. 193-195].

(12) Neither Appellant had any relative or close friend with a successful business background whom they cared to name as original trustee of said trusts. Accordingly, each named the other as original trustee [Tr. 101-102].

(13) The cash gifts made to the children on December 28, 1942, and heretofore referred to were transferred to said trusts [Exs. 22 and 23; Tr. 276, 279].

(14) The creation of said trusts and the provisions of said instruments were considered with the officials of the Union Bank and Trust Company and others and copies thereof were lodged with said bank as a successor trustee [Tr. 100-110].

(15) The trusts were created by Appellants for the purpose of creating separate estates for their children. Appellant Jack Smith discussed the trusts with his son Howard on many occasions [Tr. 99, 101].

(16) On September 29, 1943, Appellants entered into a written agreement with each other wherein Appellant Rose Mae Smith purchased from Appellant Jack Smith as her separate property a 30% interest in his sole proprietorship, the Boston Shoe Company. She paid for said interest by delivering to him two of the \$30,000 notes acquired upon the sale of her community interest in said business and heretofore referred to [Ex. 11; Tr. 197-202].

(17) On September 30, 1943, Appellant Jack Smith entered into a written agreement with the trustees of the two trusts heretofore mentioned, wherein said trustees

acquired for \$30,000 each a 15% interest each in said sole proprietorship. Said trustees paid for said 15% interest by delivering to Appellant Jack Smith the corpus of said trusts consisting in the one case of Government Bonds and in the other of said \$30,000 note [Ex. 12; Tr. 202-207].

(18) On October 1, 1943, Appellants and said trustees entered into a written agreement of partnership, each partner conveying to the partnership the interests in Appellants' sole proprietorship acquired as heretofore set forth.

Said partnership was to continue for 20 years [Tr. 217] although the trial court in its Memorandum Decision [Tr. 17] and Findings of Fact XXII [Tr. 27] stated said term was 3 years.

Profits and losses were to be shared as follows:

Jack Smith	40%
Rose Mae Smith	30%
Howard Smith Trust	15%
Barbara Ann Smith Trust	15%

In the event of the death or the termination of the partnership of or by any partner the surviving or non-terminating partners were given the right to purchase the interest of the deceased or terminating partner at book value, contrary to the statement of the trial judge [Tr. 17] and XXIII [Tr. 27] of the Findings of Fact that such right was lodged in Appellant Jack Smith alone [Ex. 13; Tr. 208-234].

(19) Said partners entered into a "Supplement to Articles of Co-Partnership" dated as of October 1, 1943, in which the salaries of Appellant Jack Smith and Appellant Rose Mae Smith were fixed at \$25,000 and

\$2,400 on an annual basis for the remainder of the year 1943 [Ex. 14; Tr. 234-237].

(20) Appellant Rose Mae Smith, as trustee for Howard, invested a substantial part of that trust's estate (the \$4,000 gift heretofore referred to was not so invested) and became a partner in the Boston Shoe Company because she finally concluded that the originally contemplated real estate investments were not advisable [Tr. 72-73]. Said action was not taken to minimize taxes but to create separate estates for the children [Tr. 73-74].

(21) Appellant Jack Smith was willing to enter into the partnership agreement just referred to because Rose Mae Smith wanted to invest her separate property in the business and thought the trusts had more opportunity for earnings in the business than could accrue from any other type of investment [Tr. 93-94, 103].

Appellant Jack Smith was anxious to eliminate the note liabilities created in 1942 by the purchase of his wife's community interest. These outstanding liabilities were impairing his credit and retarding expansion [Tr. 108]. Tax saving to the Appellants, while understood, was not a consideration for the trusts' participation in the partnership. As a matter of fact, as the trial court pointed out, taxes had been high since 1940 [Tr. 107-108].

(22) Since the partnership was not created until more than 9 months after Appellant Jack Smith's purchase of his wife's community interest in the Boston Shoe Company, the parties deemed the capital invested in the partnership on October 1, 1943, by Appellant Rose Mae Smith and the trusts to be "new" capital [Tr. 109].

(23) On January 1, 1945, a new partnership was formed with a new and different written partnership

agreement. The four old partners contributed to the new venture \$200,000 of net capital and the new partner, Herman Weishaupt (unrelated to any of the other partners), contributed \$22,000.

Earnings and profits were to be shared ratably with the capital invested as follows:

Jack Smith	36%
Rose Mae Smith	27%
Howard Smith Trust	13½%
Barbara Ann Smith Trust	13½%
Herman Weishaupt	10%

Annual salaries, to be deducted as partnership expenses, were fixed as follows:

Appellant Jack Smith	\$25,000
Appellant Rose Mae Smith	2,400
Herman Weishaupt	6,000

Said salaries were subject to change upon agreement of a majority in interest of the partners.

Said partnership was to continue for 3 years with successive renewals of 2 years each.

In the case of the death of any partner, options were granted to the remaining partners to purchase the deceased partner's interest at book value.

The partnership agreement could be amended by a majority in interest. All partnership policies were to be determined by a majority in interest among the partners [Ex. 15; Tr. 237-267].

(24) On June 30, 1948, Herman Weishaupt withdrew from said partnership. The four other partners continued the business, reverting to their original percentages [Tr. 111].

(25) Between October 1, 1943 and December 31, 1948, the Howard Smith Trust withdrew from said partnership \$81,215.41, leaving its investment in said partnership at \$30,181.10 [Ex. 21; Tr. 79-82, 276-277]. Said withdrawals were used for the purpose of paying taxes and making investments in unrelated enterprises [Tr. 79-82].

(26) Between October 10, 1943 and December 31, 1948 the Barbara Ann Smith Trust withdrew from the partnership \$75,416.84, leaving its investment in the partnership at \$35,979.67. Said withdrawals were used for the payment of taxes and for investments in unrelated enterprises [Ex. 22; Tr. 79-87, 278-279].

(27) The trial court found that there was no siphoning off of income from the trusts for the benefit of Appellants [Tr. 19, 144, 150].

(28) At all times capital was a material factor in the operation of the partnerships [Tr. 86]. See condensed balance sheets, Boston Shoe Company, October 1, 1943 to June 30, 1948 [Ex. 18; Tr. 273].

(29) The salaries paid certain of the partners throughout the existence of both partnerships were based upon the said partners' experience, training, and ability, and constituted reasonable compensation for services rendered. Appellant Jack Smith had been engaged in the shoe business since 1919 [Tr. 85]. Appellant Rose Mae Smith had been connected with the business since 1930 or 1931 [Tr. 63-64]. Herman Weishaupt had substantial experience in the operation of the partnership's business [Tr. 135].

The net income before salaries of the partnerships during the period in question was as follows:

October 1, 1943 to		
December 31, 1943	(4 partners)	\$ 41,579.42
Calendar Year 1944	(4 partners)	124,376.97
Calendar Year 1945	(5 partners)	150,622.03
Calendar Year 1946	(5 partners)	248,575.64
Calendar Year 1947	(5 partners)	86,663.70
January 1, 1948 to		
June 30, 1948	(5 partners)	68,966.64

Total salaries paid during said periods were as follows:

1943 Period	\$ 6,850
Calendar Year 1944	27,400
Calendar Year 1945	33,400
Calendar Year 1946	33,400
Calendar Year 1947	33,400
January 1, 1948 to	
June 30, 1948	16,700

[Ex. 19; Tr. 274].

(30) All formal and technical requirements incident to the creation of the trusts and the formation and operation of the partnerships were strictly complied with.

(a) The trust agreements were in writing and were complete in all details [Exs. 7 and 8; Tr. 171-194].

(b) The two partnership agreements were in writing and prescribed the rights and duties of the partners in detail [Exs. 13 and 15; Tr. 208-234, 237-267].

(c) The fictitious name certificates provided for by California law were duly prepared and filed for both partnerships [Tr. 163].

(d) Proper and appropriate accounts were set up for each partnership showing the interest of each partner, which accounts were maintained according to standard accounting practices throughout the life of said partnerships [Ex. 18; Tr. 273].

(e) Separate bank accounts and books of accounts were maintained for each trust [Tr. 79-83, 110; Exs. 21 and 22; Tr. 276-279].

(f) All required tax and information returns were duly prepared and filed in behalf of all interested parties.

(g) With respect to each partnership, insurance and other contracts were changed to indicate the partnership ownership [Tr. 110].

(h) Most of the partnership's customers and suppliers were advised as to the identity of the various partners [Tr. 111].

(31) At all times Appellant Jack Smith has expected his son Howard to enter the partnership business [Tr. 94-95]. During the trial of this cause Jack Smith stated that while his son was still in school he, Appellant, still thought that the son would enter the business [Tr. 95]. During the summertime said son worked in the business. [Tr. 74].

(32) From 1943 through 1946 each Appellant herein reported as separate income his share of the partnership income, together with one-half of the salary of each Appellant which was treated as community income. Dur-

ing the same period each trust prepared and filed its own return, reporting and paying tax on its distributive share of the partnership income according to the partnership agreements [Tr. 53-54].

(33) For 1947 and 1948, having been advised of the Treasury's intention to charge the partnership income of the trusts to Appellants, Appellants, to avoid the accrual of interest, included in their individual returns one-half of the combined partnership income of the trusts and paid the tax thereon under protest [Tr. 54]. Claims for the refund of said tax so believed to be overpaid were duly prepared and filed with Appellee [Tr. 9, 13].

(34) Appellees herein have recognized the partnership in question for all years so far as Appellants are concerned even though each Appellant's interest therein constituted his or her separate property. Appellees, however, charged one-half of the combined partnership income of said trusts to each Appellant. Appellees also recognized Herman Weishaupt as a partner in the second partnership.

(35) The trial court found against Appellants, handing down a Memorandum Decision [Tr. 15-20] and signing Findings of Fact and Conclusions of Law [Tr. 20-30]. Judgment for Appellees was then entered [Tr. 30-31].

(36) Objections to the Findings of Fact and Conclusions of Law were duly filed with the trial court but were overruled. Said objections were not embodied in the transcript of record because repeated in Appellants' Motions to Amend Findings and Judgment and for a New Trial [Tr. 32-44].

(37) Appellants' Motions to Amend Findings and Judgment and for a New Trial were denied [Tr. 44]. Thereupon this appeal followed.

Appellants' Statement of Points and Specification of Errors.

1. The District Court erred in entering judgment for the Appellees.

2. The District Court erred in adopting the findings of fact and conclusions of law filed by the Appellees.

3. The District Court erred in adopting the judgment, docketed and entered on August 23, 1954.

4. The District Court erred in denying Appellants motions to amend findings and judgment and for a new trial.

5. The District Court erred in failing to find as a fact that the partnerships involved herein were at all times bona fide partnerships entitled to full recognition for Federal income tax purposes.

6. The District Court erred in failing to enter judgment for the Appellants [Tr. 281-282].

Summary of Argument.

Appellants contend:

That the judgment entered by the trial court for Appellees was clearly erroneous because:

A. The facts as found by the trial court and as set forth in its Memorandum Decision and Findings of Fact are at complete variance with and have no support in the record and, therefore, cannot justify the judgment predicated thereon.

B. The trial court's conclusions of law, and, in particular, the determination that a trust is of no validity unless "court supervised," as that term was understood by the trial court, are in any event clearly erroneous when applied to the facts in this particular proceeding.

C. As a matter of fact and law, both partnerships constituted bona fide business arrangements wherein the parties really and truly intended to carry on business together as partners.

D. In the alternative, that even if it were to be held that the first partnership, existing from October 1, 1943 to December 31, 1944, was objectionable because of the control thereof permitted to be exercised by Appellant Jack Smith, an entirely different situation prevailed with respect to the second partnership of which Herman Weishaupt was a member and which existed from January 1, 1945 to January 30, 1948.

E. Regardless of every other consideration the judgment of the trial court must be reversed because said court made no findings of fact of lack of good faith in the formation of either partnership.

ARGUMENT.

The Judgment Entered by the Trial Court for Appellees Was Clearly Erroneous.

A. The Facts Found by the Trial Court in Its Memorandum Decision and Set Forth in Its Findings of Fact Find No Support in the Record.

These basic errors in fact determination, enumerated below, are not necessarily set forth in logical sequence but, instead, in general follow the Memorandum Decision and Findings of Fact. Some references which may appear trivial are important as illustrating what Appellants respectfully believe to be the trial court's erroneous approach to our entire problem:

(1) Son's Possible Participation in Business:

With respect to this point the trial court in its Memorandum Decision said, after stating that the son had graduated from Stanford University and was about to enter the Harvard Law School [Tr. 16]:

"These seemingly minor facts are, in cases of this character, of great importance, because, despite the fact that the son may, during his vacations, have worked in the shoe business, he is not preparing for the business and it is not likely that a man with such educational background would engage in such business with his father after completing his education."

Identical language is contained in Findings XIV and XXIX [Tr. 24, 25, 28].

With respect to this point the record [Tr. 95] discloses the following:

"The Witness (Jack Smith): He (son) is accepted into Harvard Law School now.

The Court: All right. And you think he is going to go into the shoe business?

The Witness: I think he will. Like all lawyers, I think he will eventually end up—

The Court: Then I think you are sending him to the wrong school. A man with a Harvard law degree is not going into the shoe business. He will be too proud of his Harvard degree to go into the shoe business. He may be different.”

(2) In referring to the trusts the court said [Tr. 16] and in Finding XVI [Tr. 25]:

“The Trusts are irrevocable. They are subject to the absolute power of the parents as trustees, the beneficiaries having only ‘the right to enforce’ performance.”

As a matter of fact and law, as will be hereinafter pointed out, Appellants as trustees are subject to the usual obligations of fiduciaries and the children as beneficiaries are entitled to faithful performance of the trustees. The trustees are required to accumulate the trusts’ income except for payment of trust expenses. The trustees have no discretion respecting distributions to beneficiaries until after said beneficiaries reach the age of 21. Final distributions of corpus and accumulated income are specifically provided for [Exs. 7 and 8, Art. III (c), (d) of each instrument].

(3) The trial court failed completely to differentiate between the two partnerships. For example, in its Memorandum Decision [Tr. 17] and Finding XXII [Tr. 27] the court stated that the life of the partnership was three years. The first partnership was to continue for twenty years [Ex. 13, Art. IX; Tr. 217]. The second

partnership was to continue for three years [Ex. 15, Art. X; Tr. 250].

(4) The trial court stated in its Memorandum Decision [Tr. 17] and in its Finding XVIII [Tr. 27, 28], that at all times throughout the years involved control continued to be exercised by Jack Smith. There is no evidence in the record either based upon practice or upon the provisions of the written instruments upon which said finding may be based.

This finding again illustrates the court's failure to differentiate between the two partnerships. While Appellant Jack Smith had certain broad powers under the first partnership agreement, these powers were completely eliminated in the second agreement.

In the second agreement all matters of partnership policy were to be determined by a majority in interest. *Jack Smith had no absolute powers of any kind.* Further, with respect to the second partnership, Appellant Jack Smith at no time owned a controlling interest even if his individual interest and his interest as trustee were added together. Further, there is no basis for assuming that Appellant Rose Mae Smith would always vote with Jack Smith in matters of disagreement. The record shows conclusively that the parties had from time to time disagreed with respect to certain business policies [Tr. 65, 87-88].

(5) The trial court found [Finding XX; Tr. 26] that the main partners retained the power to determine the salary to be paid to themselves.

This finding is directly contradicted by the express terms of both partnership agreements. The first partner-

ship agreement [Ex. 13, Art. V-2; Tr. 213] specifically provides that the amount of the salaries shall be determined by the partners. Further, the salaries paid under the first partnership agreement were fixed in writing by a separate agreement executed by all of the partners [Ex. 14; Tr. 234-237].

The second partnership agreement also specifically provided that the salaries should be fixed by the partners. Specified in the body of said agreement was the initial amount of said salaries [Ex. 15, Art. VI; Tr. 246]. With respect to a possible subsequent change in the amount of said salaries said agreement specifically provided that a majority in interest in said partnership "at all times has control in all matters requiring the determination of the partners" [Ex. 15, Art. XIV; Tr. 264-265].

(6) The trial court found [Finding XXI; Tr. 27] that, "no business transaction could be conducted by the partnership without the approval of the husband. Nor could it enter into any contract or incur any liability during the life of the husband while he was a partner without his consent."

While arguably such a finding might be justified with respect to the first partnership [Ex. 13, Art. VII; Tr. 215] it was completely erroneous with respect to the second partnership, which covered the period from January 1, 1945 to June 30, 1948. As heretofore pointed out the second partnership agreement specifically provided that in all matters affecting the partnership business a majority in interest should govern [Ex. 15, Art. XIV; Tr. 264-265]. Nor is there any evidence in the record to indicate that Appellant Jack Smith did in fact control in the manner specified the operations of said partnerships.

(7) The trial court found [Finding XXIII; Tr. 27] that the Appellant Jack Smith “was given the right to purchase the partnership at book value, in which event no goodwill could be considered as part of the same.”

The necessary inference from said finding is that the right specified was confined to said Jack Smith. Said finding so amplified is directly contradicted by the record.

With respect to both partnerships, *all* the partners had the same right and such right arose only as to the interest of a withdrawing or deceased partner [Ex. 13; Tr. 208-234; Ex. 15; Tr. 237-267].

(8) The trial court found [Finding XXIV; Tr. 27] that “No amendment of the partnership could be made without the consent of the husband Jack Smith.”

While such a finding could perhaps be justified with respect to the first partnership agreement, such was not the case with regard to said second agreement.

Said second partnership agreement specifically lodged said right of amendment in the partners entitled to receive a majority of the profits, that is to say, a majority in interest [Ex. 15, Art. XIII; Tr. 263-264]. At no time was said Jack Smith entitled to receive a majority of profits, either in his individual capacity or as trustee, or both combined.

(9) The trial court found [Finding XXVI; Tr. 27-28] “that at all times control was exercised and maintained by the plaintiffs in this action. The creation of the partnership and trust effected no change in the control of the business. The children had no independent voice in the management of the business, either personally or through the trusts.”

Said finding, insofar as it purports to constitute a finding of fact, is without justification in the record

either based upon actual practice or the terms of the applicable written instruments.

Prior to the formation of the first partnership, Jack Smith owned and controlled 100% of the business [Ex. 2]. During the first partnership, from October 1, 1943 to December 31, 1944, he owned but 40% individually and 15% as trustee, while Rose Mae Smith owned 30% individually and 15% as trustee [Ex. 13]. During the second partnership, from January 1, 1945 to June 30, 1948, the interests were further changed to 36% for Jack Smith individually and 13½% as trustee, 27% for Rose Mae Smith individually, and 13½% as trustee, and 10% for Herman Weishaupt, in no way related to any of the Smiths [Ex. 15]. Furthermore, there is a basic difference between control exercised with unlimited discretion solely for one's personal benefit and control exercised in a fiduciary capacity as a partner.

(10) The trial court found [Finding XXVII; Tr. 28] "The power to terminate the partnership interest remained upon the terms of the managing partner, namely, Jack Smith."

There is nowhere in the record with respect to either partnership any evidence to support such a finding or from which such a finding might be inferred. A termination by Smith would constitute him a "withdrawing" partner and give the other partners the right to purchase his interest at book value [Exs. 13 and 15].

(11) The court found [Finding XXVIII; Tr. 28] "There was no judicial control of the children's interest through a court controlled trustee or through a guardianship of the estate of the minors." While no *inter vivos* trust is under court supervision in the sense that periodic

reports are required, all trustees are subject to court control.

(12) The trial court found [Finding XXX; Tr. 28] "The said plaintiff Jack Smith voted a very large salary to himself, namely, \$25,000." The words "very large" carry with them the inference that said salary was excessive.

As heretofore stated, the salary was determined by the partners in accordance with the partnership agreements and not by the "vote" of Jack Smith. As the facts as stated indicate, the salary to be paid to Jack Smith for his services was reasonable in view of the partnerships' earnings. The trial court, as a matter of fact, erred in not finding that said salary was reasonable.

Further, the finding completely ignores the fact that both Appellant Rose Mae Smith and partner Herman Weishaupt, who as a completely unrelated individual became a partner on January 1, 1945, both received salaries commensurate with the value of their services.

(13) The trial court [Finding XXXI; Tr. 28] found "The plaintiffs retained unlimited control of both the trust and the 'partnership' indicating clearly that the 'partnership' has no existence as a taxable entity."

Again, the trial court ignores the fact that there were two partnerships. Further, there is nothing in the record to justify either as a matter of fact or law the assertion that said plaintiffs (appellants) had unlimited control.

(14) The trial court found [Finding XXXII; Tr. 28] "The children through the trust or otherwise added neither fresh capital nor skill nor even the future expectation of services."

While it is true that the children as such added no skill, since they individually did not participate in the operation of the business, such is not the case either with regard to fresh capital or future expectation of service.

As heretofore explained, on December 31, 1942, Appellants Jack Smith and Rose Mae Smith converted their community property into the separate property of each. Mrs. Smith gave up her entire interest in the Boston Shoe Company, receiving therefor interest-bearing promissory notes. Thereafter, and for a period of nine months, she had no interest in or connection with said business.

The corpus of the Barbara Ann Smith Trust was contributed by Mrs. Smith in the form of one of the notes received by Mrs. Smith as set forth above. When this note was contributed to the capital of the new partnership by said trust it was beyond any question "fresh" capital. When Mrs. Smith contributed as her share of the new partnership capital, \$60,000 in said notes, it likewise was fresh capital.

With respect to the Howard Samuel Smith Trust, it is true that the corpus thereof consisted of \$30,000 in United States Bonds contributed by Appellant Jack Smith. It may be argued that these assets, since they constituted a credit basis to Mr. Smith, did not constitute fresh capital. To so urge, however, would make it clear that the notes did constitute fresh capital since prior to their contribution they constituted bona fide obligations of Smith's sole proprietorship.

It must not be overlooked in any event that there was not here gifts of undivided interests in an already going business concern, which is the case with respect to many family partnerships which have been the subject of attack.

We have heretofore pointed out that the finding that there was “no future expectation of services” is totally without support in the record. As a matter of fact, the record indicates exactly the contrary.

Under the circumstances we respectfully submit the following:

(a) That the trial court’s findings conclusively indicate that the court totally ignored the factual difference between the two partnerships.

(b) That the court’s findings of fact being contrary to the evidence cannot sustain the conclusions of law (even if such conclusions were valid) upon which the court predicated its judgment for defendants.

(c) That because of the basic variances between the trial court’s findings and the facts as indicated by the record the Appellate Court is free to make its own findings.

(d) That the true facts, regardless of the correctness or incorrectness of the trial court’s conclusions of law, indicate that there here existed bona fide partnerships.

B. The Trial Court Misconstrued the Law Applicable to This Proceeding.

The conclusions of law [Tr. 29-30], entered by the trial court and upon which judgment for Appellees was predicated, are so sparse as to be of little assistance.

To ascertain the basis upon which it would appear that the trial court decided this cause it is necessary to refer to the Memorandum Decision [Tr. 15-20] issued by the court and to various comments made by the court during the trial of the proceeding.

In said Memorandum Decision the court referred to six elements which it was asserted were "spelled out in the *Culbertson* and subsequent cases" as indicating that the partnership had no existence as a taxable entity.

Each of these elements will be separately referred to. Some, as has been heretofore pointed out, are primarily statements of fact which, as has been shown, find no support in the record.

(1) "Absence of change of control in the business."

We submit that it has heretofore been made amply clear that this statement has no basis as a matter of fact or law.

Regardless of the "degree" of control exercisable by Appellant Jack Smith with respect to the first partnership such control was completely lacking in the second partnership.

(2) "The power to terminate the partnership interest upon the terms of the managing partner."

We have heretofore amply demonstrated that this statement is completely without foundation so far as both partnerships were concerned. Therefore, any legal significance which this fact, if true, might possess, vanishes.

(3) "The absence of judicial control through a court controlled trustee or through a guardianship of the estate of the minors."

Here would appear to be the heart of the trial court's approach to this proceeding. *In effect the trial court held that because the trustees were not court appointed with the requirement for an annual accounting or were not court appointed guardians that the trusts must be ignored for all purposes.*

This we submit is completely erroneous as a matter of law.

As evidence of the court's basic thinking in this important particular a few references to the record are in order.

(a) Before the trial was three minutes old and before the court had even read the documents in question, the following occurred [Tr. p. 50]:

"The Court: Was there any action making them (Appellants) guardians of the estate, under the state law?

Mr. Diehl: No guardianship; just a trusteeship.

The Court: In other words, *these were just one of those paper trusts that could be dissolved whenever they wanted to*, and not bound by or controlled by any court. (Emphasis supplied.)

Mr. Diehl: The trusts were irrevocable.

The Court: I know that, but they were not subject to any control by any court."

(b) Transcript page 122:

"The Court (to Appellant Jack Smith): I see, you are not responsible to anybody because you did not create a guardianship for the children, under which you would have to account every year to the court and the court would pass—

The Witness: But we can't—

The Court: Just a moment (Continuing)—and the court could pass on your acts, and determine whether you used the money wisely or not. So why were you worried about somebody taking money out of the trusts for one purpose or another?"

(c) Again, Transcript page 123:

"The Court: No court could make you put it (trust assets) back because you are not responsible to anybody.

Witness: Your Honor, I went to the best counsel I knew. * * *

The Court: Your son couldn't bring you into court under that trust, and make you account for anything, because your answer would be, 'Everything that is there I gave him, and we made the trusts, and we are not accountable to anybody.'

The Witness: Well, we didn't feel that way, your Honor.

The Court: I am talking legally.

The Witness: We didn't feel that way. Well, I didn't know the legal point."

(d) Again, Transcript page 128:

"The Court: But it is true that your (Appellant Jack Smith) creditors could not touch this trust. I assume they couldn't. I don't know. The creditors could not touch the trust *but you yourself could.*" (Emphasis supplied.)

(e) Again, Transcript page 138 (Testimony of Appellant Jack Smith):

"Q. Did you understand from Mr. Gittelsohn (Appellant's attorney) that you and Mrs. Smith, as trustees were responsible and accountable to the children for your conduct in the handling of the assets of those trusts? A. That's right.

Mr. Hochman: Your Honor, I object, that is quite a leading question.

The Court: That is all right. So long as I allowed the other one, I will have to allow this one,

to be consistent. *I don't think they are responsible. I don't think any court could touch the trusts.*" (Emphasis supplied.)

(f) Again, Transcript page 139:

"Mr. Lund (counsel for Appellants): Your Honor, if we may, we would like to have the opportunity, even if it is only a short period of time, to file a brief.

The Court: No, * * *

Mr. Lund: We are, frankly, not prepared with authorities on it, because we did not anticipate it.

The Court: It does not make any difference because *I think there is nothing to limit him in drawing it all out and spending it.*" (Emphasis supplied.)

The above quotations show clearly that the court's determination that the trusts had no substance and in effect were shams was the basis for his judgment for defendants. It would likewise appear to be the basis for the court's statement that there was no change in control.

We do not propose to burden this Court with any detailed discussion of the law applicable to the trusts here under consideration. Certain basic points, however, must be noted.

(i) SINCE THE TRUSTS IN QUESTION WERE CREATED UNDER THE LAWS OF THE STATE OF CALIFORNIA THEIR VALIDITY IS TO BE DETERMINED UNDER CALIFORNIA LAW.

There are certain universal rules which justify the imposition of federal taxes without regard to state law. The trial court, however, went far beyond any such rule in determining that the instant trusts were "paper trusts." In so holding he must be deemed to have ruled as a mat-

ter of property law that the trusts had no existence. When the issue is one of property law, the law of the state, here California, must govern.

Mr. Justice Reed in *Helvering v. Stuart*, 317 U. S. 154, 63 S. Ct. 140 (1942), at pages 161, 162, said:

"The intention of Congress controls what law, federal or state, is to be applied. * * * Grantees under deeds, wills, and trusts alike, take according to the rule of the state law. The power to transfer or distribute the assets of a trust is essentially a matter of local law. * * * Once rights are obtained by local law, whatever they may be called, these rights are subject to the federal definition of taxability."

(ii) THE TRUSTS HERE IN QUESTION ARE VALID AND EXISTING UNDER CALIFORNIA LAW.

The trusts were in writing [Tr. 171, 193]. They governed a specifically identifiable trust *res* [Tr. 194, 195]. They designated an identifiable living beneficiary [Tr. 177, 193]. They provided for lawful purposes, namely, the ultimate delivery of income and principal of property transferred to the children of the trustors respectively or to the lawful issue of such children (Cal. Civ. Code, Secs. 2220, 2221).

The trial court apparently assumed that the trustor in each case was the trustee of his or her own trust. Such, however, was not the case as each appellant trustor was trustee for the other's trust. But even if the trustor had been his own trustee each trust would have been valid.

Restatement—Trusts, Sec. 28;

1 Scott on Trusts, Sec. 17.1;

Noble v. Learned, 153 Cal. 245, 94 Pac. 1047 (1908).

- (iii) NEITHER THE DISCRETIONS GRANTED THE TRUSTEES NOR ANY EXCULPATORY CLAUSES CONTAINED IN THE INSTRUMENTS IMPAIRED THE VALIDITY OF SAID TRUSTS.

The trust instruments here in question granted certain broad discretions to the trustees with respect to the administration of the trusts and the distribution of income and principal. In addition, the trustees were exempt from liability for losses unless due to the trustees' gross negligence.

None of these provisions, however, would under any circumstances, destroy the trusts. The instruments in question under the law of the State of California conferred basic rights upon the trusts' beneficiaries and similar liabilities upon the trustees.

Loescher v. Whipple, 104 Cal. App. 782, 286 Pac. 741 (1930);

Hornung v. Sedgwick, 164 Cal. 629, 130 Pac. 212 (1913);

I Nossaman, Trust Administration and Taxation, Sec. 12;

Cal. Civ. Code, Secs. 2228, 2229, 2236, 2258.

- (iv) UNDER THE TRUSTS IN QUESTION THE RIGHTS OF THE BENEFICIARIES WERE AT ALL TIMES ENFORCEABLE BY THE COURTS OF THE STATE OF CALIFORNIA.

The conduct of the trustees, regardless of the discretions granted, cannot be wholly arbitrary, dispensing with the use of all judgment, still less could it be fraudulent.

Neel v. Barnard, 24 Cal. 2d 406, 150 P. 2d 177 (1944);

Estate of Marré, 18 Cal. 2d 184, 114 P. 2d 586 (1941);

Cal. Civ. Code, Sec. 2269.

(v) THE TRUST ASSETS COULD NOT HAVE BEEN RECAPTURED BY EITHER APPELLANT.

The trusts by their terms were expressly made irrevocable. Each trustor was specifically excluded as a beneficiary under the trust under any possible contingency [Tr. 181]. It is elementary that any such recapture of the property would have been a fraud upon the trust, subject to condemnation and correction in every court in the land.

Carrier v. Carrier, 226 N. Y. 114, 123 N. E. 135 (1919);

Colton v. Colton, 127 U. S. 300, 8 S. Ct. 1164 (1888);

II Scott on Trusts, Secs. 187.4, 222.3;

Stix v. Com., 152 F. 2d 562 (C. C. A. 2d, 1945);

Warren v. Pazolt, 203 Mass. 328, 89 N. E. 381 (1909);

Corbett v. Benioff, 126 Cal. App. 772, 14 P. 2d 1028 (1932).

In considering the law applicable to these trusts it should be remembered that the Appellants themselves by their conduct recognized their validity. The trial court in its Memorandum Decision [Tr. 19] said:

“That the parents generously deposited the profits of the partnership to the trust and did not draw from them even legitimate moneys for the education of the children so that, in 1948, the value of each trust was around \$115,000.00, is praiseworthy.”

In addition, during the trial the court made the following comments [Tr. 144]:

“So that that is an element which often is not present in other trusts of this kind, because there is

some kind of a siphoning off of the income, whether for the maintenance of the children, or otherwise, you see, and that is not present here.”

Again, the Court said [Tr. 150]:

“To that extent the case is a little different from some of the others, because in reality, through the high sense of honor—and I say that sincerely—the high sense of honor that the parents had, they felt, although, as I say, I think they could have squandered the money if they wanted to, but with the high sense of honor they had, they did not take out of the trust funds even the legitimate expenditures for the children’s education, which any court would allow them to do.”

Finally, we know of no case in which any court has held an *inter vivos* trust as opposed to a court appointed trust or a guardianship invalid *per se* in determining the validity of a family partnership.

On the other hand, in a number of cases such trusts were expressly approved. And this was true even though the parent was the trustee of his own trust and a partner in his individual capacity with said trust.

Greenberger v. Com., 177 F. 2d 990 (7th Cir., 1949);

Miller v. Com., 203 F. 2d 350 (6th Cir., 1953);

Scofield v. Mauritz, 206 F. 2d 135 (5th Cir., 1953).

As a matter of fact the trial judge in the instant case approved children’s *inter vivos* trusts as partners where the uncle of the grantor-partner was the trustee. *Osbrink v. United States*, C. C. H., U. S. T. C. 1952-2, Par. 9499 (not officially reported).

It is submitted that under all the circumstances the court's conclusion that the trusts in question were invalid was totally erroneous.

(4) "The lack of any expectation that the children would go into business * * *"

We have heretofore pointed out that so far as the above quotation is a statement of fact it has no foundation in the record. Instead, the contrary is true.

(5) "The large salary voted himself by the father—\$25,000 * * *"

In the first place, there is no justification for the use of the word "large." Although the court does not so find, the implication is plain that the term "large" is intended to mean excessive. We respectfully submit that in view of the contribution of the Appellant to the success of the partnership, and in the light of its earnings, the salary was eminently reasonable. Further, salaries were paid to the Appellant Rose Mae Smith and to the stranger partner, Herman Weishaupt.

As a matter of fact, where, as here, capital was a material income producing factor, the payment of salaries to the partners who devote their time to the affairs of the partnership has always been deemed strong evidence of validity. Failure to pay such salaries has been pointed up as evidencing lack of bona fides.

In 1951 the Internal Revenue Code (Sec. 191) was amended specifically to provide in part as follows:

"In the case of any partnership interest created by gift, the distributive share of the donee under the

partnership agreement shall be included in his gross income, except to the extent that such share is determined without allowance of reasonable compensation for services rendered to the partnership by the donor,
* * *

Further, the Commissioner himself in a Mimeograph commenting upon *Com. v. W. O. Culbertson, Sr., et ux.*, 337 U. S. 733, 69 S. Ct. 1210 (1949), specifically held that the payment of an adequate salary to an active partner was strong evidence of validity. (*Mimeograph 6767, Internal Revenue Cumulative Bulletin 1*, page 111 (1952).)

As a matter of fact, it is respectfully submitted that if the instant case had arisen after 1951 no question would have been raised with respect to the bona fides of this partnership.

Finally, a number of courts have commented on the presence or lack of salary as indicating validity or invalidity. In *Greenberger v. Com.*, 177 F. 2d 990 (7th Cir., 1949), the court said in reversing the Tax Court:

“While petitioner undoubtedly was the predominating force in the conduct and management of the business, the Commissioner overlooks the fact that the partnership paid him a salary of \$45,000 per annum during each of the taxable years for services rendered.”

In *Harold Maxwell, Sr.*, 12 T. C. Memo. Op. 63 (1953), affirmed 208 F. 2d 542 (4th Cir., 1953); *cert. den.* 347

U. S. 1013, 74 S. Ct. 866 (1954), the Tax Court, in finding the partnership invalid, said:

“While capital was a material income producing factor, the original partners, whose knowledge, skill, and personal services largely contributed to the success of the business, continued to exercise the absolute control and management of the business without salaries, notwithstanding their lesser interest in the partnership.”

We respectfully submit that the payment of a salary to Appellant Jack Smith and certain of the other partners demonstrated validity rather than invalidity.

(6) “The unlimited control of both the trusts and partnership.”

The basic error in the above statement, both as a matter of fact and law, has already been amply demonstrated and need not be further argued here.

It is respectfully submitted that none of the conclusions of law upon which the trial court based its judgment for Appellees as applied to this particular proceeding are legally defensible.

C. It Is Respectfully Submitted That the Trial Court Should Have Found the Partnerships in Question Valid for Tax Purposes Because the Parties to the Partnerships Really and Truly Intended to Join Together for the Purpose of Carrying on a Business as a Partnership and Sharing in the Profits and Losses of Said Enterprises.

It is unnecessary here to refer in detail to the authorities governing the determination of this troublesome question. This Court has been required on many occasions to review this problem and is fully familiar with the law applicable thereto.

Nor, we believe, is it necessary to restate the facts upon which the claim of validity just stated is predicated. Appellants' statement of "Facts Involved," which is amply supported by reference to the record, brings this proceeding, we submit, squarely within those authorities holding particular partnerships to be valid for income tax purposes.

We have examined all the family partnership cases decided by this Court since the decision of the Supreme Court in *Com. v. W. O. Culbertson, Sr., et ux., supra*. We believe that the decisions in *Com. v. Sultan*, 210 F. 2d 652 (9th Cir., 1954); *Com. v. Brodhead*, 210 F. 2d 652 (9th Cir.); *Com. v. Eaton*, 210 F. 2d 653 (9th Cir., 1954), and *Snyder v. Westover*, 217 F. 2d 928 (9th Cir., 1954), are applicable here and require a finding in the instant case that valid partnerships existed.

In the cases just cited, of course, the partnership was sustained. On the other hand we find nothing at variance with what has been here suggested in those cases in which this Court has refused to recognize the family partnership for tax purposes. Each of said *contra* cases has been carefully examined and it is believed that the facts in each are basically different from those here involved.

D. Even if It Should Be Held That, Because of Certain Elements of Control, the First Partnership Which Existed From October 1, 1943 to December 31, 1944 Was Invalid, It Still Follows That the Second Partnership Was a Valid Business Enterprise.

It has heretofore been repeatedly pointed out that the trial court failed completely to distinguish between the two partnerships with which we are here concerned. In the first partnership only the Appellants and the two trusts were involved. In the second partnership a new partner, not related to Appellants, entered the business, contributing both capital and services.

At the same time certain rights granted Appellant Jack Smith under the first partnership agreement were completely eliminated.

Under no theory that we know of could the second partnership be ignored for income tax purposes.

E. Regardless of All Other Considerations the Judgment of the Trial Court Must Be Reversed Because Said Court Made No Finding of Fact as to Lack of Good Faith in the Formation of the Partnership.

The findings of fact are completely silent as to possible lack of good faith with respect to the formation of the partnerships. While the conclusions of law contain the following statement [Tr. 29]: "Neither children nor trusts for children either intended to or did enter into a bona fide partnership with the parents for a business purpose," said statement is a conclusion of law and not a finding of fact.

This Court said in *Snyder v. Westover*, *supra*, in reversing the trial court:

“The trial court did not make any finding as to lack of good faith on the part of the parties in the formation of their apparently valid partnership. The recent case of *Dyer v. Commissioner*, 1954 2 Cir. 211 Fed. (2d) 500, states at page 506: ‘Finally and above all, the Supreme Court had not yet required, as it later did in *Culbertson*, that there be an explicit finding, *as a fact*, of lack of good faith intention before an apparently valid joint venture agreement could be ignored. The judge here made no such finding. Had he done so, basing it on all the elements of the situation (including among other things, the fact that the women had not read the contracts they signed) and resting his finding in part on a testimonial inference resulting from his observation of the demeanor of the witnesses who testified orally, we would have affirmed.’ For this and other foregoing reasons, the court erred in his conclusions and in his judgment.” (Emphasis supplied.)

In calling to this Court’s attention the failure of the trial court to make the finding of fact just referred to, we are not suggesting that this proceeding be remanded to the trial court. We respectfully submit that no such remand is here necessary. We are merely calling this situation to this Court’s attention as a further indication of the trial court’s failure to correctly find the facts involved and apply the law applicable.

Conclusion.

It is respectfully submitted that the judgment of the trial court in favor of Appellees should be reversed and that judgment should be entered for Appellants.

Respectfully submitted,

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Attorneys for Appellants.

Dated: March 7, 1955.

United States Court of Appeals
FOR THE NINTH CIRCUIT

JACK SMITH and ROSE MAE SMITH,

Appellants,

vs.

HARRY C. WESTOVER, Former Collector of Internal
Revenue, and ROBERT A. RIDDELL, Director of In-
ternal Revenue,

Appellees.

On Appeal From the Judgment of the United States District
Court for the Southern District of California.

BRIEF FOR THE APPELLEES.

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No. 14594
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

JACK SMITH and ROSE MAE SMITH,

Appellants,

vs.

HARRY C. WESTOVER, Former Collector of Internal
Revenue, and ROBERT A. RIDDELL, Director of In-
ternal Revenue,

Appellees.

On Appeal From the Judgment of the United States District
Court for the Southern District of California.

BRIEF FOR THE APPELLEES.

Opinion Below.

The opinion of the District Court [R. 15-20] is reported
in 123 Fed. Supp. 354.

Jurisdiction.

This appeal involves alleged overpayments of income
taxes and interest, totaling \$119,779.13, for the years 1943
to 1948, inclusive. [R. 8.] All of the amounts were paid
to Harry C. Westover, then Collector of Internal Revenue
for the Sixth District of California, except the amount
of \$2,955.17 which was paid to Robert A. Riddell, his
successor in that office. [R. 21, 22-23.] Claims for re-
fund were timely filed for all of the taxable years involved.

The claims for refund for the calendar years 1947 and 1948 were filed on March 15, 1951, and March 15, 1952, respectively. [R. 23.]

The Commissioner of Internal Revenue, by registered mail, on February 13, 1951, formally rejected the claims for refund for the calendar years 1943, 1944 and 1945, and on March 15, 1951, formally rejected the claims for the calendar year 1946. The claims for refund for the calendar years 1947 and 1948 had not been formally acted upon by the Commissioner at the time of the commencement of this action. [R. 24.] On February 11, 1953, after the rejection of the claims for refund, and more than six months after the filing of those claims which had not been acted upon by the Commissioner, this suit for refund was instituted in the District Court, all in accordance with the provisions of Section 3772 of the Internal Revenue Code of 1939. [R. 10.] Jurisdiction was conferred on the District Court by 28 U. S. C., Section 1340.

Judgment was entered against the taxpayers on August 23, 1954. [R. 30-31.] Motions to amend the findings and judgment and for a new trial were filed on September 2, 1954, and were denied on September 13, 1954. [R. 32-44.] Within sixty days thereafter, and on November 3, 1954, a notice of appeal to this Court was filed by the taxpayers. [R. 44.] Jurisdiction is conferred on this Court by 28 U. S. C., Section 1291.

Question Presented.

Whether the District Court erred in concluding, upon all of the evidence, that the taxpayers did not intend, in good faith and acting with a business purpose, to enter into partnership, during the years 1943 through 1948, with two trusts set up by them for their two minor children.

Statute Involved.

The pertinent provisions of the statute involved are found in the Appendix, *infra*.

Statement.

The pertinent facts, substantially as found by the District Court [R. 21-28], are as follows:

The taxpayers, Jack and Rose Mae Smith, are husband and wife and residents of the State of California. [R. 21.] Before his marriage to Rose Mae, Jack Smith successfully established a wholesale shoe business known as the Boston Shoe Company. After marriage they considered that the business was community property to which the husband's earning capacity contributed, and on December 31, 1942, Jack bought out Rose Mae's interest for \$102,933.89, the purchase price being represented by four promissory notes. Three of these were in the principal amount of \$30,000 and the fourth in the amount of \$12,933.89. They were due one, two, three and four years from date, respectively, and bore interest at the rate of 10% per annum. [R. 24, 169-171.]

On September 29, 1943, two trusts were created by Jack and Rose Mae Smith for the benefit of their two minor children, Howard Samuel, then aged 11, and Barbara Ann, then aged 3. Jack Smith was the settlor and Rose Mae the original trustee of the trust for their son Howard. The corpus of the trust consisted of three United States certificates of indebtedness totaling \$30,000. Rose Mae was the settlor and Jack the original trustee of the trust for their daughter, Barbara, the corpus of which consisted of the \$30,000 note executed by Jack to Rose Mae on December 31, 1942, which became due three years from

the date of execution. The trusts are irrevocable, and are subject to the absolute power of the parents as trustees, the beneficiaries having only "the right to enforce" performance. The distribution of the income is controlled by the trustee. So is the investment of the principal. The children have a graduated right to the distribution of the corpus of the trusts, one-fourth upon reaching the age of 25, one-fourth at 30, and the balance at 35. [R. 24-26, 171- 195.]

Almost simultaneously with the creation of the two trusts an alleged partnership in the shoe business was entered into effective September 30, 1943, consisting of the members of the family. Jack Smith was assigned 40%; Rose Mae Smith, 30%; and the trusts 15% each in the Boston Shoe Company. The wife acquired her interest by surrendering a \$60,000 note executed to her by Jack Smith. Both trusts exchanged their assets for the respective interests in the new partnership. [R. 26.]

Under the terms of the partnership, which was modified at one time by including an employee, then returned to the original state, control continued to be exercised by Jack Smith. [R. 26.] The partnership could not conduct business transactions, enter into any contract or incur any liability during his lifetime and continuance as a partner without his approval and consent, and no amendment of the partnership could be made without his consent. He had the power to terminate the partnership interests and to purchase the partnership at book value. [R. 27, 28.]

The main partners, the taxpayers here, retained the power to determine the amount of the salaries to be paid to themselves, which salaries were to be paid before any "distributive net profits" and were to be considered part of the cost of "doing business." Salaries of \$25,000 per year for the husband and \$2,400 for the wife were provided for under the first partnership agreement and thereafter continued under other arrangements. [R. 26-27.] The first partnership agreement provided that the partnership should have a life of twenty years; however, under subsequent arrangements entered into some 13 months later the life of the partnership was set at three years, and thereafter for successive minimum terms of two years. [R. 27, 217, 250.]

The taxpayers, as trustees for their children, represented the children in the partnership, since the children had no direct or independent voice therein, and at all times control was exercised and maintained by the taxpayers, and the creation of the partnership with the trusts effected no change in the control of the business. [R. 27-28.] There was no judicial control of the children's interests through a court controlled trustee or through a guardianship of the estate of the minors. There was no expectation that the children would ever go into the business. The children through the trusts or otherwise added neither fresh capital nor skill, nor even the future expectation of services. [R. 28.]

The District Court concluded that neither the children nor the trusts for the children intended to or did enter into

a *bona fide* partnership with their parents for a business purpose, and that therefore the partnerships entered into between the trusts and the taxpayers had no validity for income tax purposes for the years 1943 to 1948, inclusive. [R. 29.] The District Court entered judgment accordingly [R. 30-31], from which the taxpayers have taken the instant appeal. [R. 44.]

Summary of Argument.

In holding that the two trusts created by the taxpayers for the benefit of their two minor children were not partners in the wholesale shoe business conducted by the Boston Shoe Company, the District Court followed the principles prescribed by the Supreme Court and applied by this and other courts in numerous family partnership cases. The issue is who earned the business income, and its determination depends upon whether the parties intended to and did in good faith join together to carry on business as partners. This presents a question of ultimate fact, the District Court's determination of which should not be disturbed unless clearly erroneous. While no single factor is conclusive, absence of a contribution of original capital by the alleged partners, or of vital services, or of participation in management, places a heavy burden on the taxpayers.

The record unquestionably warrants the conclusion reached by the District Court that the two trusts for the taxpayers' minor children were not *bona fide* partners with the taxpayers for tax purposes. The trusts contributed to the business no capital originating with them, the *corpora*

of the two trusts having been supplied by the taxpayers for the purpose of investment in the business. No vital services were rendered to the partnership by either the taxpayers' two children or the trusts for their benefit, and the record indicates that there was no expectation that either of the two children would ever go into the business, since there was no evidence of anticipation that the daughter would ever participate and the son was obviously not preparing himself to go into the shoe business since he was about to attend Harvard Law School. Moreover, the taxpayers controlled the Boston Shoe Company and the creation of the partnership and trusts with respect to their minor children effected no change in the management and control of the business, the children having no independent voice therein, either personally or through the trusts.

The record fails to disclose how this family arrangement, consisting of the trusts and the partnership, served any business purpose of the Boston Shoe Company. The taxpayers testified that the arrangement was to protect and provide security for their minor children. This, if true, discloses a purely personal purpose rather than a business purpose. However, an analysis of what was actually done here indicates that the family arrangement in question did not add anything to the protection and security of the taxpayers' minor children. After this family arrangement was devised, the Boston Shoe Company continued to be operated just as before, and, so far as the evidence discloses, the only real effect of the change was the siphoning off of a part of the taxpayers' profits from a very lucrative business.

Despite the taxpayers' denials, the evidence indicates general tax consciousness on their part and a specific awareness of the possible income tax savings to them which might be accomplished by this arrangement, and upon all of the evidence the conclusion is virtually irresistible that the real purpose of this family partnership could have been nothing but the diminishing of federal tax liability. The existence of the tax avoidance motive supports the inference that the claimed partnership is unreal.

No real change in the economic status of the family has been shown to have resulted from the arrangement involved here, since the taxpayers in actuality retained control of the funds in the trusts and no part of the income the taxability of which is here in issue has ever been distributed to or subjected to the control of the taxpayers' children.

It is clear upon the whole record that the District Court correctly decided this case, since to accord tax effect to this family arrangement would sanction the very type of formalism condemned by the Supreme Court and by this and other courts in like cases.

ARGUMENT.

The District Court Correctly Decided, Upon All the Evidence, That the Taxpayers Did Not Intend, In Good Faith and Acting With a Business Purpose, to Enter Into a Partnership During the Taxable Years 1943 Through 1948 With the Two Trusts Set Up by Them for Their Two Minor Children.

The controversy in this case arises as a result of an attempt by the taxpayers, a husband and wife, to apportion the income from a wholesale shoe business, which was successfully established by the husband, among themselves and two trusts set up for their two minor children through the medium of a family partnership during the taxable years 1943 through 1948. The court below sustained the action of the Commissioner in disregarding the partnership of the children, or the trusts for their benefit, concluding that it had no validity for income tax purposes because [R. 29] "Neither children nor trusts for children either intended to or did enter into a bona fide partnership with their parents for a business purpose." It is our position that this conclusion, resulting from the application of correct legal principles, is amply supported by the record, and should be affirmed.

A. The Applicable Principles.

The controlling principles for differentiating between valid partnerships which were formed to conduct a business as a partnership and family arrangements which were designed to deflect income within the family group were laid down by the Supreme Court in *Commissioner v. Culbertson*, 337 U. S. 733; *Lusthaus v. Commissioner*, 327 U. S. 293; and *Commissioner v. Tower*, 327 U. S. 280. These principles are too well known to require elaborate quota-

tion from the cases having been resorted to by this Court in many instances. *Sellers v. Commissioner*, 218 F. 2d 380; *Snyder v. Westover*, 217 F. 2d 928; *Commissioner v. Sultan*, 210 F. 2d 652, affirming *per curiam*, 18 T. C. 715; *Commissioner v. Brodhead*, 210 F. 2d 652, affirming *per curiam*, 18 T. C. 726; *Wisdom v. United States*, 205 F. 2d 30; *Estate of Cochran v. Commissioner*, decided July 12, 1951 (1951 P-H T. C. Memorandum Decisions, par. 51,219), affirmed *per curiam*, 201 F. 2d 365, certiorari denied, 345 U. S. 974; *Toor v. Westover*, 200 F. 2d 713, certiorari denied, 345 U. S. 975; *Forman v. Commissioner*, 199 F. 2d 881; *Harkness v. Commissioner*, 193 F. 2d 655, certiorari denied, 343 U. S. 945; *Commissioner v. Western Construction Co.*, 191 F. 2d 401, affirming *per curiam*, 14 T. C. 453; *Giffen v. Commissioner*, 190 F. 2d 188, certiorari denied, 342 U. S. 918; *Parker v. Westover*, 186 F. 2d 49; *Nordling v. Commissioner*, 166 F. 2d 703, certiorari denied, 335 U. S. 817; *Quon v. Commissioner*, decided March 28, 1947 (1947 P-H T. C. Memorandum Decisions, par. 47,077), affirmed *per curiam*, 165 F. 2d 215, certiorari denied, 334 U. S. 845. See *Pike v. United States*, No. 14102, argued before this court on February 11, 1955.

In *Commissioner v. Tower*, *supra* (as was observed by this court in *Snyder v. Westover*, *supra*, pp. 932-933, in outlining the controlling principles), the Supreme Court found that the husband and wife, a partnership between whom was there questioned, never intended to carry on the business of the partnership and that all of the income was earned by the husband, and, under *Lucas v. Earl*, 281 U. S. 111, 114-115, must be taxed to the party earning it, the court stating (p. 290):

There can be no question that a wife and a husband may, under certain circumstances, become partners

for tax, as for other, purposes. If she either invests capital originating with her or substantially contributes to the control and management of the business, or otherwise performs vital additional services, or does all of these things she may be a partner * * *. But when she does not share in the management and control of the business, contributes no vital additional service, and where the husband purports in some way to have given her a partnership interest, the Tax Court may properly take these circumstances into consideration in determining whether the partnership is real within the meaning of the federal revenue laws.

Lusthaus v. Commissioner, supra, was decided upon the same principles. Thereafter, the Tax Court, in deciding family partnership cases, commenced to regard as essential to the validity of a partnership for tax purposes the several elements referred to in the *Tower* and *Lusthaus* opinions merely as constituting circumstances indicating the reality of a family partnership. As a consequence, the Supreme Court, again considering the family partnership question in *Commissioner v. Culbertson, supra*, stated (p. 742):

The question is not whether the services or capital contributed by a partner are of sufficient importance to meet some objective standard supposedly established by the *Tower* case, but whether, considering all the facts—the agreement, the conduct of the parties in execution of its provisions, their statements, the testimony of disinterested persons, the relationship of the parties, their respective abilities and capital contributions, the actual control of income and the purposes for which it is used, and any other facts throwing light on their true intent—the parties in good faith and acting with a business purpose intended to join together in the present conduct of the enterprise.

While no single factor is “conclusive,” failure of the trusts to contribute capital that did not originate elsewhere, or to participate in “management and control of the business,” or to perform “vital additional service,” in connection with the instant partnership, has the effect of placing “a heavy burden on the taxpayer to show the bona fide intent of the parties to join together as partners.” *Commissioner v. Culbertson*, *supra*, p. 744; *Wisdom v. United States*, *supra*, p. 34; *Harkness v. Commissioner*, *supra*, p. 657, fn. 3; *Feldman v. Commissioner*, 186 F. 2d 87, 90 (C. A. 4th). The rationale of the Supreme Court’s decisions in the *Tower*, *Lusthaus*, and *Culbertson* cases is that the trial court is not obliged to accord tax effect to a legally perfect family partnership arrangement which produces no substantial change in the carrying on of the business or the earning of the income therefrom, but merely brings about a reallocation of income within the family group.

“The statutes of Congress designed to tax income actually earned because of the capital and efforts of each individual member of a joint enterprise are not to be frustrated by state laws which for state purposes prescribe the relations of the members to each other and to outsiders.”

Commissioner v. Tower, *supra*, p. 288. The standards laid down in the *Tower*, *Lusthaus*, and *Culbertson* cases for measuring the validity of family partnerships for tax purposes apply with the same force where, as here, the taxpayers transfer a portion of their business capital in trust for the benefit of their minor children and an

alleged partnership agreement is made with the trustees. The interposition of the alleged trust, while it may create added legal formalities on paper, does not necessarily make any change in the economic realities within the family group. *Toor v. Westover, supra*, p. 715; *Quon v. Commissioner, supra*; *Giffen v. Commissioner, supra*, p. 190; *Boyt v. Commissioner*, 209 F. 2d 839, 845 (C. A. 8th), certiorari denied, 347 U. S. 1014; *Feldman v. Commissioner*, 186 F. 2d 87, 91 (C. A. 4th); *Stanback v. Robertson*, 183 F. 2d 889, 892 (C. A. 4th), certiorari denied, 340 U. S. 904. "In tax matters the realities of a transaction, not artificialities, are given effect." *Nordling v. Commissioner, supra*, p. 704.

The vital question in this case, namely, whether the taxpayers, in good faith and acting with a business purpose, intended to join in the operation of the partnership with the two trusts for their minor children is one of ultimate fact and, accordingly, the trial court's disposition of the matter should not be disturbed unless shown to be clearly erroneous (*Toor v. Westover, supra*, p. 717; *Harkness v. Commissioner, supra*, p. 658); that is, the trial court should be sustained unless upon an examination of the entire evidence this court is left with "the definite and firm conviction that a mistake has been committed" (*McAllister v. United States*, 348 U. S. 19, 20; *United States v. Oregon Med. Soc.*, 343 U. S. 326, 339; *Toor v. Westover, supra*, p. 717; *Grace Bros. v. Commissioner*, 173 F. 2d 170, 174 (C. A. 9th)).

B. The Record Amply Supports the District Court's Conclusion That the Family Partnership Here in Question Was Not Valid for Tax Purposes.

It is clear that, in deciding this case, the District Court was correctly advised as to the guiding legal principles [R. 18-19] and that, viewed in the light of those principles the record fully supports its decision.

1. NO CONTRIBUTION OF NEW CAPITAL.

As the court below found [R. 28], the trusts for the taxpayers' minor children brought no "fresh capital" to the Boston Shoe Company upon entering into the partnership agreement of October 1, 1943, with the taxpayers [R. 131-132]. The *corpora* of the two trusts which were conveyed to the business consisted of \$30,000 of Government bonds supplied by taxpayer Jack Smith and a \$30,000 note supplied by his wife Rose Mae which she had received from her husband, who was the maker thereof, on December 31, 1942, and which was not payable until three years from that date. [R. 194-196, 202-207.] The gist of this transaction was briefly put by taxpayer Jack Smith in response to questions from the court as follows [R. 109]:

"The Court: How were you getting money for the creation of this trust?

The Witness: Well, first we were going to give it to the kids, and then we thought we could invest it well in our own business.

The Court: Taking back your own money; is that it? You didn't bring in any outside money?

The Witness: Well, we gave it away to them, and we brought it back again.

The Court: I see. It was that way.

The Witness: That's the way we were advised to do it."

2. NO RENDITION OF VITAL SERVICES.

The record, in full accord with the District Court's findings [R. 28], discloses that no vital services were rendered to the partnership by either the taxpayers' two minor children or the two trusts for their benefit during the taxable years involved. On the contrary, the trusts rendered no services at all [R. 234-237, 246] and, of course, the taxpayers' daughter and son were only three and eleven years of age, respectively, at the time of the inception of this family partnership [R. 24-25] and there is nothing in the record which suggests that either of them rendered vital services. Moreover, the District Court found that there was no expectation that either of the taxpayers' children would ever go into the business. [R. 28.] The record is devoid of evidence of any anticipation that the daughter would ever participate in the business. At the time of the trial of this case, the son, then 22, had secured a degree in chemistry at Stanford University and had entered Harvard University as a post-graduate student where he had been accepted at the Harvard Law School. [R. 25.] From these facts it is certainly permissible, to say the least, to infer, as the District Court did [R. 25] that the taxpayers' son was not preparing himself to enter the wholesale shoe business. The District Court, in so inferring, was fully within its proper province, for it is the function of the trial court to weigh the testimony, draw inferences, and pass on the credibility of witnesses. *Elmhurst Cemetery Co. v. Commissioner*, 300 U. S. 37, 40; *Helvering v. Kehoe*, 309 U. S. 277, 279; *Helvering v. Nat. Grocery Co.*, 304 U. S. 282, 294-295.

3. NO PARTICIPATION IN MANAGEMENT AND CONTROL.

The evidence amply warrants the finding below that [R. 27-28]:

“At all times throughout the years involved control was exercised and maintained by the plaintiffs in this action. The creation of the partnership and trusts effected no change in the control of the business. The children had no independent voice in the management of the business either personally or through the trusts.”

The Boston Shoe Company was established by Jack Smith prior to his marriage to Rose Mae. [R. 89.] He is a man of long experience in the wholesale shoe business, having begun actively participating for himself in that business as early as 1919 [R. 85], and in his own words is [R. 86] “considered a man that knows shoes.” Certainly, the record leaves little room for doubt but that he exercised the management and control of the Boston Shoe Company both prior to and during the family partnership the tax effects of which are here questioned. This is demonstrated by the salaries paid by the business during the period of the partnership agreements. [R. 235-236, 246.] He was the [R. 116] “head man” throughout, and every indication is that it was never contemplated that either the children or the trusts for their benefit should exercise any management or control over the business. [R. 66, 72-73, 127-128.] Jack Smith made the major decisions in connection with the business and the children had no independent voice in it whatever, as the District Court, concerning itself with the operation in practice, brought out [R. 136]:

“The Court: You never took a vote with your wife or children to decide by a majority vote what you were going to do?

The Witness: Oh, with my wife, yes, I would discuss certain things.

The Court: You would discuss it with her?

The Witness: Yes.

The Court: But with the children?

The Witness: With the children, no.

The Court: So whatever you and your wife decided had to bind the children?

The Witness: That's right, yes."

4. NO BUSINESS PURPOSE FOR INCLUDING THE TRUSTS AS PARTNERS.

The record fails to disclose any business purpose of the Boston Shoe Company to be served by the family arrangement challenged here. On the contrary, it is replete with testimony that the purpose of the trusts was to protect and provide security for the taxpayers' minor children. [R. 65-66, 70, 74, 93, 99, 125.] It is, of course, entirely natural for parents to be concerned for the welfare of their children. However, actions taken from such a motive are obviously purely personal in nature and can scarcely be said to serve any business purpose. It should be added, however, that there is little logic in the taxpayers' contention that their purpose was to provide security for their children through the medium of the trusts and the family partnership arrangement. As Jack Smith testified, he was fully aware of the fact that he could leave such property as he wished to his children by will, and, in fact, had a will drawn. He added nothing to his children's security by tying such gifts as were made them to the business which was already the means of the family support. [R. 125-130.] While taxpayer Jack Smith suggested that the purpose of making the trusts partners was because [R. 108] "the money be-

gan to be needed. * * *. * * * we needed a little bit more capital in the business, too * * *," it is clear, as we have discussed previously herein, that this family arrangement brought no new capital into the family business. We find nothing in the record which indicates how the business of the Boston Shoe Company was in any manner served by the trusts and family partnership. On the contrary, it is clear that the business continued to be operated just as it had been prior to this arrangement and, in so far as the evidence discloses, the only change effected by the inclusion of the trusts as partners was the siphoning off of a part of the taxpayers' profits from a business which [R. 77] "At that time * * * was a very lucrative one."

The taxpayers both denied that the transactions at issue here were at all motivated by tax considerations. [R. 73, 107.] However, this self-serving testimony, as the trial judge observed [R. 73], "is not necessarily binding on the court, because it must be considered against the background of the facts." Furthermore, other evidence suggests that the taxpayers may not have been nearly so unconcerned with tax considerations in their activities as their denials would lead one to believe. In 1942 it appears that each of the taxpayers' children was given [R. 67] "a small gift of three or four thousand dollars, I don't recall, *whatever the Government allowed.*" (Italics supplied.) And in 1943, upon their son's graduation from Stanford, the taxpayers each gave him \$3,000. This amount also happened to be just what *the Government*

allowed, and the same may be said of the two \$30,000 gifts made in trust for the children in 1943.¹ Thus, each of the gifts disclosed by the record is in precisely the maximum amount, no more and no less, which it may have been possible under the law to give without the payment of any federal gift tax. Beyond this, Jack Smith, while denying that the creation of the family arrangement in dispute here was purposed to save income taxes, nevertheless conceded that [R. 107] "It may have been explained that it might save." It appears, therefore, that not only were the taxpayers generally tax conscious in their activities here, but specifically they were fully aware of the income tax savings anticipated from the family partnership. To believe otherwise would be naive in the extreme. We submit that, upon all of the evidence, the conclusion is practically inescapable that the real purpose of this family partnership could have been nothing but the diminishing of federal tax liability. Existence of a tax avoidance motive "simply lends further support to the inference" that the claimed partnership is unreal. *Commissioner v. Tower, supra*, p. 289.

¹Section 1003(b)(3) of the Internal Revenue Code of 1939, as added by Section 454 of the Revenue Act of 1942, c. 619, 56 Stat. 798 (26 U. S. C. 1952 ed., Sec. 1003), provides for an annual exclusion of the first \$3,000 of gifts made by a donor to any person during the calendar year 1943 and subsequent calendar years. Section 1004 of the Internal Revenue Code of 1939, as amended by Section 455 of the Revenue Act of 1942, *supra* (26 U. S. C. 1952 ed., Sec. 1004), allows each donor a specific exemption in the amount of \$30,000 which he may allocate against his gifts from year to year as he sees fit until the exemption is exhausted.

5. NO REAL CHANGE IN THE ECONOMIC STATUS OF THE FAMILY.

The Supreme Court, in the *Tower* case, *supra*, pages 291-292, noted that if a partnership brings about no real change in the economic relationships of a family to the income in question, the result of the so-called partnership will be a "mere paper reallocation of income among the family members." That principle clearly seems to be appropriate here. The position of the taxpayers rests heavily upon "paper," that is, the written provisions of the trust and partnership instruments which they had prepared, and the legal consequences said to flow therefrom under state law. Of course, as we have previously observed herein, state law is not controlling here, and the Government is not bound by the legal effect thereunder of written agreements between parents and their children. If it were otherwise, taxpayers could readily frustrate the purpose of Congress to tax income to the members of the family who actually earn it. However legal and enforceable an agreement between parents and their children, the execution of which is in no way subjected to the interests of outsiders, may be under state law, the important reality is that such persons usually are not dealing with each other at arm's length. The family ties and relationships between the parties to such agreements may leave the beneficiaries thereof neither free nor disposed to enforce them in actuality. In such a case "The actualities of their relation to the income * * * [does] not change." *Commissioner v. Tower, supra*, p. 292. In so far as the record here discloses, the taxpayers have not shown the existence of any real change in the economic status of the family. Significantly, after the taxpayers were advised that the Federal Government and the State of California would

not recognize this family arrangement for tax purposes, they simply had prepared an additional "paper" whereby they agreed between themselves as individuals and as trustees of the trusts for their children that the trusts should bear the burden of the additional taxes to be imposed against them individually. [R. 268-272.]² The realities of the situation here are fully indicated by this action. Obviously, the trust assets are readily accessible to the taxpayers and they may, with the same facility with which they dipped into them to pay their personal tax liabilities, resort to such assets for other purposes. [R. 50.]

It must be observed that no distribution of the income here involved has been made by the taxpayers to their children. While under the trust instruments, the trustees had the discretion within certain limits to advance sums for the maintenance, support and medical care of the beneficiaries while they were between the ages of 21 and 25, the beneficiaries have no power to draw against the trust estates prior to their attaining the age of 25. [R. 105, 177-179.] The taxpayers' son has never been consulted about what was to be done with the trust money since he became of age [R. 105], nor is there any indication in the record that either of the children ever exercised any actual control over the income, the taxability of which is here in issue.

Finally, the taxpayers assert (Br. 39) that regardless of all other considerations the judgment of the trial court must be reversed because that court made no finding of

²It is noteworthy that in this agreement the taxpayers, just as did the District Court [R. 26], treated this family arrangement as one continuing family partnership, and attached no significance to the fact that there was more than one written partnership agreement.

fact as to lack of good faith in the formation of the partnership.³ The taxpayers in this connection rely upon this Court's decision in *Snyder v. Westover*, 217 F. 2d 928. But the instant proceeding is entirely different from the *Snyder* case. In the latter suit (p. 935) "The trial court did not make any finding as to lack of good faith on the part of the parties in the formation of their apparently valid partnership," whereas here, as the taxpayers concede (Br. 39), the trial court included in its conclusions of law a statement that: "Neither children nor trusts for children either intended to or did enter into a bona fide partnership with their parents for a business purpose." [R. 29.] The fact that this statement (which is in the nature of an ultimate finding supported by many of the evidentiary facts set forth in the findings of fact and the record in general) appears under the conclusions does not change the essential factual nature thereof, and since this statement in the conclusions "provides a clear understanding of the basis of the decision below * * * the absence of findings of fact * * * is not sufficient to justify a reversal in this case." *Burnham Chemical Co.*

³Inconsistently the taxpayers assert in the last paragraph of their argument under this point (Br. 40):

In calling to this Court's attention the failure of the trial court to make the finding of fact just referred to, we are not suggesting that this proceeding be remanded to the trial court. We respectfully submit that no such remand is here necessary. We are merely calling this situation to this Court's attention as a further indication of the trial court's failure to correctly find the facts involved and apply the law applicable.

Moreover, it seems clear that such a remand would be entirely an unnecessary formality since, as we will point out hereinafter, the District Court's view as to lack of good faith is already stated in its conclusions of law.

v. Borax Consolidated, 170 F. 2d 569, 574 (C. A. 9th), certiorari denied, 336 U. S. 924, rehearing denied, 336 U. S. 955. It may perhaps have been inappropriate to place this vital finding under the heading of "Conclusions of Law," but we submit that the court's action is not of such a nature as presents a ground for a reversal by this Court. As this Court stated in *Refrigeration Engineering v. York Corp.*, 168 F. 2d 896, 900, certiorari denied, 335 U. S. 859:

The trial court "concluded" that plaintiff had infringed claim 13 * * *. Plaintiff says that the court did not make any finding of fact to support this "conclusion" and erred in failing to make such a finding. Actually, this so-called conclusion was a finding of fact. It was error to call it a conclusion of law, but the error does not require reversal of the judgment. *Baldwin Rubber Co. v. Paine & Williams Co.*, 6 Cir., 99 F. 2d 1; *Minnesota Mining & Mfg. Co. v. Coe*, 75 U. S. App. D. C. 131, 125 F. 2d 198; *Smith v. Fletcher*, 80 U. S. App. D. C. 263, 152 F. 2d 20.

To hold that the District Court was obliged as a matter of law to accord tax effect to the instant arrangement would sanction the very type of formalism repeatedly condemned by the Supreme Court and by this and other courts in like case. It is respectfully submitted that the District Court's decision in this case is fully in accord with the actualities as revealed by the record, and is not clearly erroneous.

Conclusion.

The judgment below is correct and should be sustained.

Respectfully submitted,

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April, 1955.

APPENDIX.

Internal Revenue Code of 1939:

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

* * * * *

(26 U. S. C. 1952 ed., Sec. 22.)

SEC. 181. PARTNERSHIP NOT TAXABLE.

Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity.

(26 U. S. C. 1952 ed., Sec. 181.)

SEC. 182. TAX OF PARTNERS.

In computing the net income of each partner, he shall include, whether or not distribution is made to him—

* * * * *

(c) His distributive share of the ordinary net income or the ordinary net loss of the partnership, computed as provided in section 183(b).

(26 U. S. C. 1952 ed., Sec. 182.)

SEC. 3797. DEFINITIONS.

(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—

* * * * *

(2) *Partnership and Partner.*—The term “partnership” includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation; and the term “partner” includes a member in such a syndicate, group, pool, joint venture, or organization.

* * * * *

(26 U. S. C. 1946 ed., Sec. 3797.)

No. 14594

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JACK SMITH and ROSE MAE SMITH,

Appellants,

vs.

HARRY C. WESTOVER, former Collector of Internal Revenue, and ROBERT A. RIDDELL, Director of Internal Revenue,

Appellees.

APPELLANTS' REPLY BRIEF.

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FILED

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PAUL P. O'BRIEN, CLERK

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IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

JACK SMITH and ROSE MAE SMITH,

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vs.

HARRY C. WESTOVER, former Collector of Internal Revenue, and ROBERT A. RIDDELL, Director of Internal Revenue,

Appellees.

APPELLANTS' REPLY BRIEF.

I.

Appellees Have Completely Failed to Meet Appellants' Contention That the Facts as Found by the Trial Court and Upon Which the Trial Court's Judgment Was Founded Are Basically Erroneous.

The appellants believes that here, as is true of most controversies, if the facts involved are truly understood the determination of the law applicable becomes relatively simple.

Accordingly, appellants, in their opening brief, in the utmost good faith undertook to state carefully and accurately the basic facts of this contvoresy. Each statement made was carefully buttressed by exact references to the record.

It is unfortunate that appellees in their brief do not even attempt to answer the bulk of appellants' statements with respect to the facts involved. Instead, appellees accept without question the facts as found by the trial court in its memorandum decision and findings of fact. Appellees apparently believe that constant repetition of a statement converts error into truth.

We earnestly request that this Court determine the facts involved upon its own account and refer to the record as documented in the "Statement of Facts" in appellants' opening brief beginning on page 5.

While no useful purpose will be served by restating the trial court's errors as compounded by appellees, a few of these basic mistakes may well be referred to.

(1) *Appellees have completely ignored appellants' repeated reference to the fact that we are here dealing with two separate and distinct partnerships.*

Any alleged weakness in the first partnership agreement is imputed to both. The flatness with which this is done is difficult to understand or explain.

For example, appellees say (Br. p. 4):

"The partnership could not conduct business transactions, enter into any contract or incur any liability during his lifetime (Jack Smith) and continuance as a partner without his approval and consent, and no amendment of the partnership could be made without his consent."

The above statements are deemed important by appellees so far as the problem of control is concerned. Appellees assert that the above facts existed throughout the period with which we are involved which includes two

partnerships. This is true despite appellants' repeated statements that regardless of what might have been the situation with regard to the first partnership, the second partnership agreement provided to the exact contrary.

(2) *Appellees compound their error by stating* (Br. p. 4), "*he had the power to terminate the partnership interests and to purchase the partnership at book value.*"

As appellants carefully pointed out in their opening brief this statement, while again of importance so far as control is concerned, is directly contrary to the facts as disclosed by the record. Under neither partnership could Jack Smith terminate the partnership and purchase the assets at book value. With respect to both partnerships all the partners had the same right and such right arose only as to the interest of a withdrawing or deceased partner.

(3) *Appellees state* (Br. p. 5), "*the main partners, the taxpayers here, retained the power to determine the amount of salaries to be paid themselves * * *.*" *Such a statement is not only completely incorrect factually but discloses a confused approach to the entire problem.*

As appellants have heretofore pointed out in their opening brief salaries were fixed by the vote of the partners. Further, the use of the word "retained" is obviously misleading. Prior to the formation of the partnership Appellant Jack Smith was operating a sole proprietorship consisting of his separate property. As such he paid himself no salary. At the same time Appellant Rose Smith had separate property consisting of the obligations of Jack Smith. She obviously paid herself no salary.

As has been repeatedly indicated the fact that salaries were paid to the active partners based on the worth of the services performed by each has, except in this controversy, been deemed an element of strength instead of weakness.

This Court may be very certain that in this case if the partners, other than the Trusts, had drawn no salary, appellees would have pointed out that fact in no uncertain terms and claimed that it demonstrated lack of reality.

(4) *Appellees state in their brief on a number of occasions that "No part of the income, the taxability of which is here in issue, has ever been distributed to or subjected to the control of the taxpayers' children."*

Here again is an example of appellees' clouded thinking. The Trusts specifically provided that income should be accumulated until the beneficiaries attained 21. Thereafter, and until 25, income was distributable at the discretion of the trustee. Beginning at age 25 corpus and undistributed income was to be paid over to the beneficiaries at five-year intervals until exhausted.

At the time of the trial of this proceeding neither beneficiary had attained 25. The trial court complimented appellants for their generosity in supporting the children regardless of the fact that they could have drawn for their support upon the Trust. Appellees thus become critical of a course of conduct praised by the trial court.

(5) *Repeatedly appellees urge that no "fresh capital" was contributed by the Trusts. Here again appellees ignore the plain facts involved.*

Nine months before the first partnership was formed appellants divided their community property as evidenced by their investment in the Boston Shoe Company because

of a disagreement as to business policies. Appellant Rose Smith received bona fide notes of Jack Smith totalling over \$100,000.

The partnership eventually formed was not contemplated when the community property was divided. The appellants originally considered providing for their children by gifts which would be invested in income real estate.

When the first partnership was formed, Mrs Smith contributed as her share \$60,000 of her husband's notes which were her separate property. This was certainly fresh capital so far as she was concerned. One of the Trusts made as its contribution to the partnership capital a \$30,000 note of Appellant Jack Smith, obtained through Mrs. Smith. This was certainly fresh capital in the sense that it was not theretofore employed in Jack Smith's business.

The second Trust contributed to the partnership \$30,000 in government bonds obtained from Jack Smith by means of a bona fide gift. Said bonds had not been employed in appellants' business except as a base for credit.

It must be borne in mind that Appellant Jack Smith testified without equivocation that one of the reasons he wanted Mrs. Smith back in the business was to eliminate the note liability which restricted his credit and area of expansion.

Further, and what is of particular importance and which constitutes a point missed completely by appellees is the fact that we do not have here a split up of a going business with no change whatsoever in assets or liabilities.

II.

Appellees Have Likewise Failed to Meet Appellants' Contention That the Trial Court Misconstrued the Law Here Applicable.

Appellees, instead of considering specifically appellants' enumeration of the errors committed by the trial court in applying the law to this proceeding, have indulged in generalities constituting mixed allegations of fact and law.

(1) *Appellees make much of the contention that here there was no contribution of capital by the Trusts.*

We have heretofore pointed out that in our judgment this statement is totally without merit both as a matter of fact and law.

Appellees apparently urge that if the owner of a going business withdraws cash or securities from his investment portfolio, gives these to a relative and that relative invests these securities or the cash obtained therefrom in a new enterprise with the donor that no fresh capital has entered the business.

It is respectfully submitted that such is not the law.

This very point was considered by this Court in *Snyder v. Westover*, 217 F. 2d 928 (1954).

There the taxpayer entered into a written partnership agreement with his children, giving each child a 25% interest in the partnership evaluated at \$2,500.

The Commissioner urged that this did not constitute a capital contribution of the child. This Court disposed of that contention in the following language:

“This \$2,500 represents a one-fourth interest in the partnership, and was given to Geraldine by plaintiff

at the time of the partnership agreement. Appellee argues that since the \$2,500 had its 'genesis in her father's largess' it cannot be considered a capital contribution of her own. The mere fact that the contribution of the daughter originated with the father is not conclusive."

(2) *Appellees argue that there was no rendition of vital services.*

This is, of course, true so far as the children were concerned since they were both admittedly minors during the years in question.

The basic fallacy of appellees argument; however, lies in the bland assumption that the appellants in the capacity of trustees could not and did not render vital services to the partnership.

As will hereinafter be pointed out we have again the failure on the part of the appellees to give any weight, legal or otherwise, to the Trusts with which we are here concerned.

(3) *Appellees urge that there was no participation in management and control.*

In their brief (p. 16) appellees quote from a colloquy between the trial court and the Appellant Jack Smith:

"The Court: You never took a vote with your wife or children to decide by a majority vote what you were going to do?"

The question misses the point. Of course, the vote of the children was not taken. The children were beneficiaries of irrevocable trusts. They had no right nor power to direct the conduct of the trustees and it was never contemplated that they should have such right.

Apparently the trial court would not have objected to such lack of power on the part of the children had the trustees been court appointed. Because they were voluntary *inter vivos* trustees, however, the instrument under which they functioned became a worthless bit of paper.

(4) *Appellees urge that there was "no business purpose for including the Trusts as partners."*

Assuming that any such business purpose is necessary, we respectfully submit that it here existed. As has been heretofore pointed out when Appellant Jack Smith divided his community property with his wife bona fide liabilities to the extent of more than \$100,000 were created. These liabilities, which showed in his financial statements, affected his credit and limited expansion.

Business judgment called for the elimination of this liability from Jack Smith's operating statement.

Exactly the same situation existed with respect to the obligation of appellant contributed by one of the Trusts. The moment this obligation ceased to exist appellant's credit base was increased.

While a somewhat different situation may have existed with respect to the \$30,000 in bonds contributed by the second Trust there is certainly no rule of law which requires a business purpose with respect to each and every partner in a partnership.

The fact is that the partnership when formed was a different and stronger business entity than had theretofore existed considering the various partners separately.

(5) *The appellees urge that everything which was here done was motivated by tax saving consideration.*

First, there is no evidence in the record upon which any such assertion can be based. In fact the available evidence is exactly to the contrary.

Appellees urge with considerable warmth that because the gifts made to the Trusts were within the gift tax exemptions and exclusions that a general tax plan is evidenced.

Presumably if \$31,000 had been given by Appellant Jack Smith to one of the trusts instead of \$30,000 we would have had no problem. To state such an assertion is to disprove it.

(6) *Finally, appellees urge that there was no real change in the economic status of the family.*

This statement is totally without merit both as a matter of fact and of law. We have heretofore pointed out the facts involved, outlined the division of the community property by the appellants, followed by the reinvestment of said property including property received by the Trusts as gifts in a new enterprise *to which additional capital was contributed and with respect to which an enlarged business was carried on.*

The exhibits attached to the record, the statements of the trial court, and the other available evidence indicates conclusively that each of the parties maintained his financial independence and interest in the new enterprise.

Appellees urge, however, that because the Trusts agreed to pay to the appellants a certain portion of the extra taxes which appellants have been compelled to pay as a

result of appellees' attack upon the partnership that the evidences lack of economic reality.

Appellees, however, failed to properly inform the court as to the nature of the agreement in question [R. 268 272]. Said agreement between the trusts and the appellants provides that in the event the appellants are compelled to pay additional taxes because of the inclusion in appellants' income of the Trusts' share of partnership income then the Trusts would pay to the appellants amounts equal to the tax due from the Trusts at the rate applicable to said trusts.

The agreement was not, as appellees assert, that the Trusts would bear "the burden of additional taxes to be imposed against them (appellants) individually."

The agreement simply meant that the Trusts would not profit by appellees' erroneous actions in this proceeding.

The Trusts paid their own individual taxes during the years in question. When the appellees added the income in question to appellants' income appellants were required to pay a tax at a much higher rate than would be due from the Trusts.

When the appellants paid the taxes here in controversy appellees refunded to the Trusts the taxes theretofore paid by them.

If the Trusts kept this refund they escaped completely tax free, thus making a profit equal to the amount of tax which they thought was due from them on account of the income received by them from the partnerships.

The agreement in question merely provided that in the event of such payment by appellants that the Trusts would pay to the appellants the tax legitimately due from said Trusts. The result was to leave the Trusts in exactly

the same position as if the appellees had not attacked the validity of the partnerships. The Trusts made no profit and suffered no loss.

Despite this obviously equitable approach appellees assert that this agreement proves that the Trust assets "are readily accessible to the taxpayers and they may with the same facility with which they dipped into them to pay for personal tax liabilities resort to such assets for other purposes." We respectfully submit that such a statement ignores realities, is without foundation in the record and made with questionable propriety. As a matter of fact, appellees' assertion demonstrates again the basically erroneous attitude of the trial court and appellees toward the Trusts in question.

It must be obvious that a trustee whether court appointed or otherwise can make mistakes. In both cases the trustee, when discovered, must respond to the wronged beneficiary. The rights of the beneficiary to proceed against the trustee for wrongful conduct are identical in both cases. This basic premise was pointed out by appellants in their opening brief on a number of occasions. Appellees, however, never made the slightest effort in their brief to answer in any respect this important contention. Instead they fall back upon the trial court's findings of fact, memorandum decision, and conclusions of law.

Again it is respectfully urged that the judgment of the trial court was clearly erroneous and should be reversed.

Respectfully submitted,

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Dated: April 15, 1955.

In the
United States
Court of Appeals
For the Ninth Circuit

In the Matter of the Application for a
Writ of Habeas Corpus of BEN F.
MASON, *Appellant*,

v.

JOHN R. CRANOR, Superintendent of
Washington State Penitentiary at
Walla Walla, Washington,
Appellee.

No. 14597

APPEAL FROM THE UNITED STATES DIS-
TRICT COURT FOR THE EASTERN DISTRICT
OF WASHINGTON, SOUTHERN DIVISION

HONORABLE SAM M. DRIVER, JUDGE

BRIEF OF APPELLEE

FILED

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HONORABLE SAM M. DRIVER, JUDGE

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OF WASHINGTON, SOUTHERN DIVISION

HONORABLE SAM M. DRIVER, JUDGE

BRIEF OF APPELLEE

JURISDICTION

The appellee accepts the jurisdictional state-
ment of the appellant.

COUNTER STATEMENT OF THE CASE

On June 21, 1939, the appellant herein was
convicted, sentenced and committed to the Washing-
ton state penitentiary at Walla Walla, Washington,

following a plea of guilty to the crime of grand larceny in King County Cause No. 20096 and was subsequently sentenced to a term of not more than fifteen years in said penitentiary. On July 13, 1949, the parole board, pursuant to statute, granted to the said appellant a parole and at the same time issued to said appellant a discharge from supervision (Tr. 90). Said parole, which was accepted by appellant herein, had certain conditions with which the appellant had to comply, the basic condition being his good conduct (Tr. 90, 91). On September 27, 1949, the Board of Prison Terms and Paroles was advised by the prosecuting attorney of Klickitat County, Goldendale, Washington, that they were interested in the whereabouts of the appellant because an NSF check had been passed in that community, to which appellant had affixed his signature. The check was returned by the bank with the notation "account closed" (Tr. 91). [It will be noticed that subsequently, during the course of the criminal proceedings in Spokane resulting in a conviction from which this habeas corpus proceedings stems, Mr. Mason in testifying, denied that he had ever issued a check in Goldendale and it was only after some time and a check to which his signature was affixed had been admitted into evidence that Mr. Mason conceded that he had written the check, saying that the day before he had not recalled writing it (Resp. Exh. 1).] Because the check had been written, which was a violation of the

Board of Prison Terms and Paroles act of the state of Washington, the parole officer of the board in Seattle issued a memorandum to all district parole officers concerning appellant, requesting that the district parole officer locate appellant (Tr. 91). On January 10, 1950, while on parole the appellant was picked up by the Spokane Police Department on a disorderly conduct charge. He posted a bond and forfeited the same the following day (Tr. 91). However, on January 11, 1950, the district parole officer in Spokane, A. J. Murphy, received a copy of the daily reports of arrest for trial made by the Spokane Police Department and in examining this list discovered the name of appellant, Ben F. Mason. He then proceeded to the Police Department to ascertain the whereabouts of Mr. Mason as he wanted to apprehend him pursuant to the instruction received from his chief parole officer. Upon ascertaining the address of appellant, he and Officer Lampeer of the Spokane Police Department, went to the appellant's place of abode, notified him that he was a parole violator, put him under arrest and took him to the city jail, placing a hold on him. Later he was transferred to the county jail and while in the county jail the appellant's landlady, to whom the appellant owed rent, called Mr. Murphy and advised him that she had some belongings of the appellant which she wanted to get out of the way. Pursuant to this call, Mr. Murphy went to the St. Clair hotel and the landlady gave him a box which

contained things that belonged to Mason (Tr. 92). In examining the box he found a receipt to the Spokane hotel made out to T. R. Powers, a check-book from the Spokane Eastern branch of Seattle First National Bank and a key to one of the local hotels. Upon calling on the hotel for which a receipt had been issued and the hotel to which the key belonged he discovered that Powers and Mason were one and the same person. Prior to this there had been certain checks issued to hotels in Spokane which apparently were forged checks and the writer of these checks had not been apprehended. However, subsequent to Mason's arrest, the appellant, Mason, and the writer of the forged checks were identified as one and the same person. The prosecuting attorney later filed an information against the appellant herein which resulted in the conviction of appellant in Spokane County on charges of having forged checks in Spokane. This the appellant had readily admitted.

ARGUMENT

The petitioner has alleged that the arrest was illegal because of some federal rule that no one has authority to issue a parole violation warrant except in strict compliance with the conditions imposed by law. I think it may be fair to assume that whatever the situation be with respect to federal parole officers, it has no relation or bearing on the procedure required of individual state parole officers.

First, in 39 Am. Jur., page 577, § 91, Pardon, Reprieve and Amnesty, in speaking of paroles it is said:

“ * * * It [parole] does not wipe out the conviction, but merely suspends its operation by remitting for the time being the confinement at hard labor, until the end of the term or an unconditional pardon is granted; the offender in the meantime is subject to prison discipline and to be taken into custody on violation of any of the conditions, as though the parole had not been granted. * * * ”

It is needless to say, and the record so indicates, that Mr. Mason had a full scale hearing in the superior court of the state of Washington for Spokane county on an application for habeas corpus and a subsequent appeal to the Washington state supreme court which affirmed the trial court. Notwithstanding Mr. Mason's statement about illegal arrest in violation of the searches and seizures act, the Honorable Raymond Kelly, trial judge in the state proceedings on April 15, 1952, entered findings

of fact and conclusions of law in which he found that no constitutional right of appellant was denied him (Tr. 92). In addition, Judge Kelly in his oral opinion, speaking of the taking of the personal effects of Mr. Mason, said

“ * * * To hold otherwise, would simply mean that Mr. Murphy, having arrested the man and knowing that his personal effects were there, would have to either abandon them or wrap them all up and take them and hand them to the inmate then under arrest in a jail without any examination whatsoever. He would have been derelict in his duty if he had done that. It is my opinion that these articles and checks to which strenuous objection has been raised were, in a sense, in the effects of Mr. Ben F. Mason, petitioner herein, and not during the search and seizure, in the legal sense of the words. Mr. Murphy did not go out, in fact, he didn't have any idea at the time he picked Mr. Mason up about the four or five forged checks so there wasn't any testimony connecting Mr. Mason up with it. He had come across them when he was making an examination of Mr. Mason's effects in what I would hold to be the ordinary course of his duties and it was not only his right but his duty to do that before turning him in to the institution here for safekeeping. Now, what happened?

“At that moment, at the time of arrest, it was not known to Mr. Murphy that Ben Mason had forged these checks. That developed later, and it developed as a result of an investigation upon the part of the police officers. However, I repeat, there was no use trying to minimize any possible effect that these exhibits may have had, they would have had or may have had some effect in the proof of the charges against

Mr. Mason. It is my opinion that they were merely cumulative as far as the proof of forgery is concerned. Why do I say that? Because as of January the 25th, which was some several weeks, as I recall it, before he was formally charged with this forgery, he admitted it in writing, and these exhibits, even if erroneously admitted under all the circumstances of the case are not prejudicial to the defendant, in the Court's opinion.

"And, so, being legally in custody, as I hold, the discovery of these things which were later used in evidence in connection with the forgery charges on which the defendant was convicted, was not a violation of the petitioner's constitutional rights." (Res. Ex. 1, pages 18-20.)

It would appear that what we are here dealing with is a question of evidence. In the case of *Salsburg v. Maryland*, 98 L. Ed. 281, 346 U. S. 545, 74 S. Ct. 280, the defendant had been convicted in a state court of certain gambling misdemeanors after admission of evidence which was conceded to have been obtained by an illegal search and seizure. He sought a reversal of this conviction on the ground that the statute under which the evidence was submitted was violative of the equal protection laws of the 14th amendment. In that case the law of Maryland was such that the county in which he was tried permitted the admission of illegally obtained evidence although other counties in the state did not and the admission of such evidence was barred by statute. The supreme court rejected the contentions of the petitioner and in affirming the conviction said:

“ * * * Rules of evidence being procedural in their nature, are peculiarly discretionary with the lawmaking authority, one of whose primary responsibilities is to prescribe procedures for enforcing its laws. * * *

We do not sit as a super-legislature or a censor. ‘To be able to find fault with a law is not to demonstrate its invalidity. It may seem unjust and oppressive, yet be free from judicial interference. The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific.’ * * * We find little substance to appellant’s claim that distinctions based on county areas are necessarily so unreasonable as to deprive him of the equal protection of the laws guaranteed by the Federal Constitution. The Equal Protection Clause relates to equality between persons as such rather than between areas. This was established long ago in a decision which upheld a statute of Missouri requiring that, in the City of St. Louis and four counties, appeals be made to the St. Louis Court of Appeals, whereas appeals made elsewhere in that State must be directed to the Supreme Court of Missouri. * * *

The state of Washington has a statute on searches and seizures found in RCW 10.79.040 which reads as follows:

“It shall be unlawful for any policeman or other peace officer to enter and search any private dwelling house or place of residence without the authority of a search warrant issued upon a complaint as by law provided.

“Any policeman or other peace officer violating the provisions of this section shall be guilty of a gross misdemeanor.”

In addition, the state constitution follows the illegal searches and seizures provision of the United States constitution. As has been pointed out, the superior court in the trial of the habeas corpus proceeding in Spokane county specifically found that there had not been, as a matter of fact, an illegal search and seizure which constituted a violation of appellant's constitutional rights. We are concerned then with the question of due process of law, that is the process by which the state of Washington, or any other state, convicts a person accused of crime and whether or not that conviction and the processes leading up to it have been accepted and constitute fair and equal practice by our standards. The supreme court of the United States on this question stated in *Leland v. Oregon*, 343 U. S. 790, 96 L. Ed. 1302, 72 S. Ct. 1002, that:

“ * * * In *Davis v. United States*, (US) *supra*, we adopted a rule of procedure for the federal courts which is contrary to that of Oregon. But ‘[i]ts procedure does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar.’ * * * ‘The judicial judgment in applying the Due Process Clause must move within the limits of accepted notions of justice and is not to be based upon the idiosyncrasies of a merely personal judgment. * * * An important safeguard against such merely individual judgment is an alert deference to the judgment of the state court under review.’ * * * ”

Nothing could be clearer than this.

In speaking of the ruling of the district court the appellant has made several assignments of error and stated that the federal trial court erred in finding that there had been no perjury committed during the course of the trial. So far as this is concerned, it is felt the record speaks for itself. Regarding the question of the state using perjured testimony, even assuming this to be true, there was certainly no showing by testimony in any proceedings that the state knowingly used such testimony. However it appears that the alleged perjury was actually an error in the naming of a county in which the petitioner was alleged to have "hung some paper." Mr. Mason's contention is apparently that he did not write a bad check in Kittitas County but rather in Klickitat County. Judge Driver found that the similarity of the names of counties could very easily confuse a witness and this is clear in the record which was made by the petitioner at the time of his habeas corpus hearing in Spokane, Washington. It is worthy to note that during this habeas corpus proceeding the petitioner was represented by counsel and did have every protection during that proceeding and every right to present any question he and his counsel saw fit to present.

Appellant has in addition stated as a matter of fact that the state of Washington discriminatorily denied him an appeal *in forma pauperis*. Art. I, § 22, of the Washington State Constitution as amended by the 10th Amendment thereto, provides that one

of the rights of an accused criminal is the "right to appeal in all cases." RCW 2.32.240 provides in part as follows:

" * * * * *Provided*, That when the defendant in any criminal case presents to the judge presiding satisfactory proof by affidavit or otherwise that he is unable to pay for such transcript the judge presiding, if in his opinion justice will thereby be promoted, may order said transcript to be made by the official reporter, which transcript fee therefor shall be paid out of the county treasury as other expenses of the courts are."

In the criminal proceeding in Spokane County superior court the appellant, being desirous of appealing that conviction, moved the trial court to order the county to bear the expense of the transcript of record and printing of the briefs. The trial court exercising its discretion denied the motion. The appellant is contending that his constitutional rights are thereby *ipso facto* violated. In the oral opinion of the Honorable Raymond F. Kelly in the habeas corpus case (Resp. Exh. 1), he commented on this and stated as follows:

" * * * * He then asked for a statement of facts and transcript of the record *in forma pauperis* asking that the state pay the expense of his appeal so that he could present this matter in the course of an ordinary appeal to the supreme court. It was in connection with that that he asked for the state to pay the expense and it was during that proceeding, as I recall, that Mr. Mason made statements substantially the same as he testifies to here in open court and in which he has been corroborated by other

documentary evidence entered here today. He told the court at that time that he had forged these checks but he was critical because he thought the prosecuting attorney had made some kind of deal also with him or an agreement, and also that the people to whom he had given these checks or the firms to whom he had given these checks had indicated that he would be given an opportunity to pay them back, so that he was standing there before the court in virtually the same position that he is now telling the court 'Yes, I committed these forgeries, but the State of Washington has not properly proven that I have committed them. A request for a record *in forma pauperis* is addressed to the sound discretion of the Court at least, in the ordinary appellate procedure and the discretion is to be exercised according to this standard, as I recall the statute; the Court grants the request if, in his opinion, the ends of justice will be thereby served. I think Mr. Mason should know at this time that I didn't feel in view of his remarks, in accordance with his request at that time, that I didn't feel that it would be in the ends of justice to accord him a transcript to try out a purely academic question, when he told me, as he reiterated, that he forged these checks, so, I denied his petition.'

Now, we may agree that the petitioner had a constitutional right to appeal, but not at the public's expense. In *State ex rel. Bird v. Superior Court* 30 Wn. (2d) 785, the court said at page 787, in commenting on an application for appeal *in forma pauperis*:

" * * * After considering all of the facts, records, and files, respondent judge denied the petition and announced that, in his opinion, justice would not be promoted by

furnishing petitioner Bird with a free statement of facts, to be made by the official reporter and payment therefor to be made by the county treasurer. The court expressed the conviction that Bird had been accorded a fair and impartial trial, in which no grave or prejudicial errors had occurred.

“ * * * * *

“ * * * we are committed to the rule that the constitutional provision under which a person convicted of crime is given the right to appeal, does not include the right to require the county to defray the cost of a transcript on appeal in the case of an impecunious defendant. In *State ex rel. Marr v. Superior Court*, 163 Wash. 459, 1 P. (2d) 331 (all of the authorities are reviewed therein), which has never been modified, we held that the statute (Rem. Comp. Stat., § 42-5, now Rem. Supp. 1943, § 42-5) which authorizes the trial judge, upon satisfactory proof of inability to pay, to order a transcript if, in his opinion, justice will thereby be promoted, vests the matter in the discretion of the trial judge. * * *

As evidenced by the transcript of Judge Kelly's opinion, he stated that in the application for appeal in the original proceeding, he did exercise his discretion and did not see that justice would be promoted by granting the petitioner a statement of facts free of charge.

The cases which petitioner cites in support of his claim of denial of equal protection clearly do not support his claim. The case of *Dowd v. Cook*, 340 U. S. 206, was a case in which the warden of the penitentiary, in which the petitioner was incarcerated, had physically restrained him from mail-

ing out a notice of appeal. The only thing that was denied Mason was a free transcript. There is nothing in our constitution or laws which require that any defendant be given a free transcript. The petitioner was clearly not denied a right to appeal by the state of Washington.

CONCLUSION

It is respectfully submitted that appellant has had his day in court. He has been accorded due process at each and every step of his original conviction and in his subsequent and post conviction remedies. He has pursued them vigorously but appellee submits that despite this vigorous prosecution of his "case" the appellant has not made out a denial of any constitutional guaranty.

Respectfully submitted,

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